

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-2053

United States Court of Appeals

For the Second Circuit

JOHN SUGGS,

Petitioner-Appellee,

against

J. EDWIN LAVALLEE,

Respondent-Appellant.

**On Appeal from the United States District Court
for the Southern District of New York**

JOINT APPENDIX

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District Attorney, New York County

Attorney for Respondent-Appellant

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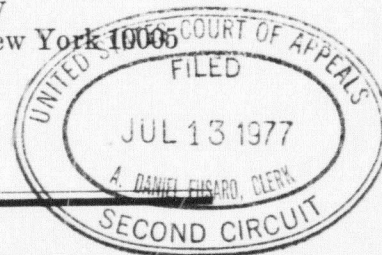
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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury-demand date:

D. C. Form No. 106 Rev.

JUDGE DUFFY

ATTORNEYS

TITLE OF CASE

U.S.A. ex rel. JOHN MUG S

VS.

J. FRED LAVALLEE, Supt. of Clinton State Corr.
Institution, Dannemora, NY

For plaintiff:

John Surges

#45968

Box B

Dannemora, NY 12829

Judson A. Parsons, Jr. (6-26-73.)

140 Broadway (Rm. 4500)

New York, N.Y. 10005

344-8000

For defendant:

Louis J. Lefkowitz

Atty. Gen. for the State of

The Capital

Albany, N.Y. 12224

by Stanley L. Kantor, Deputy Asst.

Atty. Gen. of counsel

80 Centre Street

N.Y., N.Y. 10013

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISS.

J.S. 5 mailed X

Clerk

3/24/75 Lefkowitz
4/5/75 [unclear]

5-

5-

J.S. 6 mailed ✓

Marshal

Basis of Action Petition for
Writ of Habeas Corpus.

Docket fee

Witness fees

Action arose at:

Depositions

JUDGE DUFFY

~~JUDGE PIERCE~~

72 CV 433

ATE

PROCEEDINGS

(Pg #2)

Date of Judgment

Oct. 13-72 Filed Petition for writ of habeas corpus and affdvt.

Oct 17-72 Filed Order permitting petitioner to proceed in forma pauperis without prepayment of fees. POL'ACK, J.

Nov 2-72 Filed defts affidavit by Stanley L. Kantor in opposition.

Nov. 27-72 Filed Notice of Assignment to Judge Pierce.

3-15-73 Filed deft's supplemental memorandum in opposition to pltf's application for habeas corpus relief.

Jun. 26-73 Filed petitioner's attorneys notice of appearance.

Aug 16-73 Filed stip and order that this action be placed on the suspense calendar until such time as petitioner properly exhausts his state remedies on the issue of his mental competency. So Ordered Duffy J. m/n

Apr. 19-74 Filed petitioner's affdvt. of Judson A. Parsons, Jr. and notice of motion for an order to remove action from suspense calendar and for leave to file supplemental petition. Ret. 4-30-74.

May 17-74 Filed memo in support of motion filed 4-19-74. Motion granted. So ordered- DUFFY, J. (n/n)

May 31-74 Filed respondent's affdvt. of David R. Spiegel in opposition to petitioner's supplemental application for habeas corpus relief.

June 11-74 Filed petitioner's memorandum in reply to respondent's affdvt. in opposition.

Feb. 1-75 Filed opinion for the reasons stated, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question. DUFFY, J. (n/n) CTO

Mar 24-75 Filed defts notice of appeal from the decision of J. Duffy.

(mailed notice for)

Mar 24-75 Filed order granting respondents's motion for a stay. J. Duffy

Mar. 25-75 Filed notice that the record on appeal has been certified and transmitted to the USCA on 3-26-75.

Aug. 21-75 Before DUFFY, J. conference held and concluded.

Sept. 3-75 Filed Memorandum-Order-OPINION # 13022-- for the reasons stated and since the necessary witnesses will include Justices of the Supreme Court, it appears to me that the proper forum for taking their testimony would be the Supreme Court of the State of New York. Accordingly, the matter is remanded to that Court with the request that appropriate Administrative Justice assign it for hearing. It would be appreciated if the state court action could be completed within 90 days. The remand is so ordered. DUFFY, J. (copy to pro se)

Sept. 3-75 Mailed copy of above mentioned Memorandum and Order mailed to Supreme Court, of N.Y., 60 Centre St., N.Y.C.

Sept. 3-75 Filed true copy of U.S.C.A. opinion and order that the order of the D.C. is vacated and the action is remanded to said District Court for further proceedings.

Dec. 14-75 Filed petitioner's affdvt. and notice of motion for an order for summary judgment or, in the alternative, for an evidentiary hearing. m/n

Dec. 29-75 Filed Memorandum Brief in support of motion by Petitioner for summary judgment or hearing in this court.

Jan. 8-76 Filed petitioner's Statement of undisputed facts pursuant to Rule 9(g)

01-29-76 Filed respondent's affdvt. and notice of motion for an order to dismiss. Ret. 02-24-76

1-29-76 Filed memorandum of law in support of motion to dismiss.

1-30-76 Filed petitioner's reply memorandum-

2-06-76 Filed affdvt. of Robert Segwald, Ass't D.A., N.Y. County, in connection with deft's response to petitioner's renewed application for habeas corpus.

04-06-76 Filed memorandum of law in opposition to motion for summary judgment or hearing

04-06-76 Filed statements in opposition to petitioner's statement under Rule 9(g)

05-13-76 Filed petitioner's reply memorandum.

(CONT'D - Pg. #3)

VIL DOCKET CONTINUATION SHEET

DUFFY, J.
JA 3

PLAINTIFF		DEFENDANT	DOCKET NO. 72-1
UNITED STATES OF AMERICA ex rel JOHN SUGGS		J. EDWIN LA VALLEE, Superintendent, Clinton State Correctional Facility, et	PAGE 3 OF 3
DATE	NR.	PROCEEDINGS	
11-16-76		Filed OPINION # 45370 and Order-- for the reasons stated, both petitioner's motion for summary judgment and respondent's motion to dismiss are denied. The matter will be set down for an evidentiary hearing. So ordered- DUFFY, J. (-/n)	
12-22-76		Filed writ of habeas corpus for John Suggs on 01-10-77	
01-12-77		Filed Order-- that petitioner's atty. Judson A. Parsons, Jr., Esq., appointed by an order of this Court dated 6-5-73, is authorized to obtain the expert services of Dr. August F. Kizel, a qualified psychiatrist and that said Dr. Kizel be permitted to examine and test Petitioner on or before 1-15-77, said examination to be conducted in the medical clinic or other appropriate facility of Petitioner's place of incarceration. DUFFY, J. (-/n)	
01-17-77		BEFORE DUFFY--Hearing Begun on Petitioner's Application for Writ of Habeas Corpus. Deft produced in Court on Writ- - Hearing Adjourned SINE DIE. Writ Adj. SINE DIE.	
01-21-77		Hearing continued from 1-17-77 and concluded. Decision Reserved.	
03-07-77		Filed letter dated 3-1-77 from John P. Suggs to Duffy, J. (7)	
03-10-77		Filed transcript of record of proceedings dated 1-17-77	
03-31-77		Filed Pltff's letter to Duffy, J Dated: 3--17-77.	
03-31-77		Filed Pltff's letter to Duffy, J Dated: 3-24-77.	
04-06-77		✓ Filed Opinion # 45761 and Order-- for the reasons stated, and since the pleas taken when Suggs was incompetent must be regarded as null and void, etc., petitioner's guilty pleas are vacated and the writ of habeas corpus shall issue sixty days from the date of the filing of this opinion, unless within that time petitioner is allowed to plead to the indictment in state court. It appears, however, that on the basis of communications I received from petitioner following the hearing, that petitioner may be exhibiting the same symptoms which gave rise to his original commitment to Attleboro; i.e. a belief of persecution by the prison authorities and fear for his life, and periods of blackouts. It may be appropriate that the state court causing petitioner to be examined once again as to his mental competency at this time. So ordered- DUFFY, J. (-/n)	
04-25-77		Filed respondent's affdvt. and notice of motion for an order for a stay pending appeal and granting the habeas corpus petition..	
04-26-77		Filed petitioner's affdvt. of Judson A. Parsons, Jr. in opposition to motion for a stay pending appeal of this Court's order filed 4-6-76.	
05-06-77		Filed Respondent's notice of appeal to USCA from the final judgment entered 5-5-77 granting the petition for a writ of habeas corpus... Copy sent Judson A. Parson, Jr., Esq. Ent. 5-6-77	
05-09-77		Filed notice of motion for stay pending appeal. Motion for stay pending appeal granted-provided the appellant seeks expedited treatment of the appeal. So ordered- DUFFY, J. (-/n)	

CONTINUED ON PAGE 4.

JA 4

DOCKET CONTINUATION SHEET

PLAINTIFF

DEFENDANT

72 CIV 4336

DOCKET NO.

S.A.

J. EDWIN LAVALLEE, ETC.

PAGE 4 OF PAGE

DATE	NR.	PROCEEDINGS	DUFFY, J
05-09-77		Filed Judgment that petitioner's plea of guilty entered on 9-13-68 in satisfaction of Indictment Nos. 3063/68, 3063A/68 and 2251/68 are Vacated and that the writ of habeas corpus shall issue 60 days from date of filing of aforesaid opinion, unless within the time petitioner is allowed to replead to indictments in state court. DUFFY, J JUDGMENT ENTERED 5-9-77. RAYMOND F. BURGHARDT, CLERK	
05-31-77		Filed transcript of record of proceedings, dated 1-21-77	
6-3-77		FILED LETTER DTD. 12/30/76 FROM THE DA, NYC TO JUDGE DUFFY, RE: JUDGE'S DECISION TO DENY RESPONDENT'S MOTION TO DISMISS THE H/C PROCEEDINGS.	

(MINUTES OF SUGGS' GUILTY PLEA, SEPTEMBER 13, 1968)

Ind. No. 3063 -68
3063A-68

SUPREME COURT: STATE OF NEW YORK

COUNTY OF NEW YORK

SPECIAL and TRIAL TERM, PART 39

-----X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

PLEA OF GUILTY

JOHN SUGGS,

Defendant.

-----X

100 Centre Street,
New York, N. Y.
September 13, 1968.

B e f o r e:

HON. EMILIO NUNEZ, J.

- - -

A p p e a r a n c e s:

FOR THE PEOPLE: JOHN P. COLLINS, ESQ.,
Assistant District Attorney

FOR THE DEFENDANT: ANTHONY F. MARRA, ESQ.
[Legal Aid Society]
By: DONALD TUCKER, ESQ.,
of Counsel.

- - -

Plea

THE CLERK: John Suggs, from the pen.

[Mr. Collins, Mr. Tucker and the defendant are present in court.]

MR. COLLINS: Your Honor, may we approach the bench?

THE COURT: Yes.

[Whereupon, Mr. Collins and Mr. Tucker approach the bench for a discussion held off the record, after which the following proceedings resume on the record, in open court:]

MR. TUCKER: Your Honor, I have an application on behalf of the defendant Mr. John Suggs.

At this time concerning Indictment Number 3063 of 68 Mr. Suggs wishes to withdraw a previously entered not guilty plea and plead guilty to rape in the first degree, the first count of the indictment, in full satisfaction of that indictment ~~and~~ pending before the Court.

I have a further application, Your Honor, On Indictment Number 3063A of 68 Mr. Suggs wishes to withdraw a previously entered not guilty plea and plead guilty to the first count of the indictment, robbery in the first degree, in a full satisfaction

of the indictment pending before the court.

Your Honor, both of these pleas are also to cover Indictment Number 2251 of 68.

THE COURT: 2251.

MR. TUCKER: Of '68, yes, sir.

THE COURT: Yes.

MR. COLLINS: Your Honor, the People respectfully recommend the acceptance of pleas of guilty by this defendant, first, to the crime of rape in the first degree, the first count of Indictment 3063 of 1968.

With reference to the facts of that count, the defendant is charged with --

THE COURT: Excuse me.

Mr. Suggs, I want you to listen carefully to what the district attorney is saying now, please. Can you hear him all right?

THE DEFENDANT: YES, sir.

THE COURT: All right, go ahead.

MR. COLLINS: The defendant is charged with having raped and having sexual~~MM~~ intercourse with a woman by the name of Doris A. Mohit on May the 24th, 1968, at about 8:35 in the evening in the

Plea

vicinity of Hamilton Avenue at 139th Street in the City and County of New York and engaging in sexual intercourse by means of forcible compulsion. The forcible compulsion --

THE COURT: What was it that he was alleged to have done, Mr. Collins, please? Where precisely?

MR. COLLINS: Hamilton Avenue and 139th Street.

THE COURT: Was it out on the sidewalk or in the building inside or where?

MR. COLLINS: It was in a building, Your Honor, on a roof landing.

THE COURT: On a roof landing?

MR. COLLINS: Right. The forcible compulsion that I mentioned was in the nature of the defendant saying to the victim that he had had a gun in his pocket at the time. Now --

THE COURT: And he did have the sexual intercourse with this lady?

MR. COLLINS: He did, Your Honor.

THE COURT: Doris A. Mohit, all right. What is the gist of the robbery charge?

MR. COLLINS: With reference to Indictment 3063A of 1968, the People respectfully recommend the

acceptance of a plea of guilty by the defendant to the crime of robbery in the first degree, the first count of that indictment.

With reference to the facts of the crime, the defendant is charged that on April 30, 1968, he stole property from Eleanor Evans, the property being eight dollars, her purse and United States currency, and he had a knife in his possession at the time that he stole the property from Eleanor Evans, and this took place at about 7:40 in the evening at 136th Street between Amsterdam Avenue and Broadway on April the 30th.

THE COURT: Excuse me. Eight-thirty p.m. you say?

MR. COLLINS: Seven-forty p.m., Your Honor.

THE COURT: Seven-forty. And where?

MR. COLLINS: 136th Street between Amsterdam Avenue and Broadway.

THE COURT: And what is he alleged to have done, taken this purse?

MR. COLLINS: Yes, Your Honor.

THE COURT: Containing eight dollars from this lady?

Plea

MR. COLLINS: Yes, Your Honor.

THE COURT: In what manner did he take it?

MR. COLLINS: He had a knife at the time.

THE COURT: Well, what about the knife? Did he threaten to use it?

MR. COLLINS: He held out the knife at the time the purse was removed.

THE COURT: Mr. Suggs, how old are you?

THE DEFENDANT: Seventeen.

MR. COLLINS: Your Honor.

THE COURT: Yes.

MR. COLLINS: Before Your Honor questions the defendant, I might just add that thsoe pleas are recommended by the People, these pleas of guilty to be in full satisfaction of each of the two indictments mentioned, 3063 of 1968, 3063A of 1968, and Indictment Number 2251 of 1968.

Now, if Your Honor will notice, also on the calendar there is an additional number of 3523.

THE COURT: Yes.

MR. COLLINS: Of 1968.

THE COURT: I have a copy of that indictment in front of me at the present time. I hav_e examined

Plea

it, and the counts listed in that indictment are the same counts as the counts listed in Indictment Number 3063A~~m~~, the same victim, the same crimes, Eleanor Evans. How did that happen, I wonder?

MR. COLLINS: Well, through an error there ~~are~~ were two indictments handed down, but the same crimes are listed in both indictments.

So in view of that, after examination of the two indictments, the People would move to dismiss Indictment 3523 of 1968 in view of the fact that it is covered or it is the same indictment as 3063A of 1968.

THE COURT: I take it you have no objection to it.

MR. TUCKER: No objection, Your Honor.

THE COURT: All right, that motion is granted. Indictment Number 3523 of 1968 is dismissed on motion of the district attorney.

Now, Mr. Suggs, you say you are seventeen?

THE DEFENDANT: Yes, sir.

THE COURT: When were you born?

THE DEFENDANT: June 27th, 1951.

THE COURT: And where were you born?

THE DEFENANT: Harlem Hospital.

THE COURT: Here in New York?

THE DEFENDANT: Yes, sir.

THE COURT: You went to school here?

THE DEFENDANT: Yes, sir.

THE COURT: How far did you go?

THE DEFENDANT: Eleventh grade.

THE COURT: What high school did you go to?

THE DEFENDANT: Charles Evans Hughes.

THE COURT: And where were you living when you were arrested?

THE DEFENDANT: 519 West 143rd Street.

THE COURT: With whom?

THE DEFENDANT: My aunt.

THE COURT: Where is your father and mother? Where are they?

THE DEFENDANT: My mother is dead and I don't know where my father is.

THE COURT: Do you have any brothers or sisters?

THE DEFENDANT: I have one sister.

THE COURT: How old is she?

THE DEFENDANT: Twenty-tw.

THE COURT: How long have you been in jail now?

Plea

THE DEFENDANT: Over three months.

THE COURT: Have members of your family been to see you?

THE DEFENDANT: No, sir.

THE COURT: This aunt of yours, was she your blood aunt or is it you just call her aunt?

THE DEFENDANT: I call her my aunt.

THE COURT: How long have you lived with-- what is her name?

THE DEFENDANT: Geraldine Hall.

THE COURT: How long have you lived with her?

THE DEFENDANT: Since '65.

THE COURT: And your sister, where does she live?

THE DEFENDANT: She lives down South.

THE COURT: When did your mother die?

THE DEFENDANT: '62.

THE COURT: You don't know -- when was the last time you saw your father?

THE DEFENDANT: When I was about ten or nine.

THE COURT: Now, is Mr. Tucker from the -- one of the attorneys on the staff of the Legal Aid Society your attorney in this ~~xxx~~ case?

THE DEFENDANT: Yes, sir.

THE COURT: Have you talked over these cases that are pending against you with Mr. Tucker?

THE DEFENDANT: Yes, sir.

THE COURT: Did you hear him tell me that you wish to plead guilty to two very serious crimes, one is rape in the first degree and the other one is robbery in the first degree? Did you hear Mr. Tucker tell me that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your wish?

THE DEFENDANT: Yes, sir.

THE COURT: Did you hear the district attorney tell me that with reference to the rape case it is the People's claim that on May 24, 1968, at about 8:35 p.m. you had sexual intercourse with a woman whose name was ~~EBMM~~ Doris A. Mohit and you had this relation with her against her will and by use of force? And he said that this is stated ~~in~~ -- it is alleged to have taken place in a building on Hamilton Avenue and 139th Street on that day? Did you do that?

THE DEFENDANT: Yes, sir.

Plea

THE COURT: What did you do with this woman?

THE DEFENDANT: I took her up to the top floor.

THE COURT: Had you seen this woman before at all?

THE DEFENDANT: No, sir.

THE COURT: Where did you pick her up or where did you get ahold of her?

THE DEFENDANT: Coming off Amsterdam.

THE COURT: Coming off Amsterdam?

THE DEFENDANT: Yes.

THE COURT: Was it dark on this day?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, you are not married to her?

THE DEFENDANT: No, sir.

THE COURT: You had never seen her before?

THE DEFENDANT: No, sir.

THE COURT: And what did you do? How did you get her to go up there?

THE DEFENDANT: Told her if she didn't go up there I would blow her head off.

THE COURT: Well, do you feel any remorse for having done this? Do you feel sorry you did something

like that?

THE DEFENDANT: No, sir.

THE COURT: You don't feel sorry?

THE DEFENDANT: No, sir.

THE COURT: Well, you wouldn't like that to happen to your sister, would you?

THE DEFENDANT: It did.

THE COURT: What?

THE DEFENDANT: It did.

THE COURT: That happened to your sister?

THE DEFENDANT: Yes, sir.

THE COURT: You weren't happy about it, were you?

THE DEFENDANT: No, sir.

THE COURT: So you didn't like it?

THE DEFENDANT: No, I didn't.

THE COURT: You did not like it?

THE DEFENDANT: I did not like it.

THE COURT: This lady that you raped on May 24th didn't have anything to do with the rape on your sister, did she?

THE DEFENDANT: No, sir.

THE COURT: Why did you attack her?

Plea

THE DEFENDANT: I just had it in mind.

THE COURT: You just had it in your mind?

THE DEFENDANT: Yes, sir.

THE COURT: About how old a person was this lady?

THE DEFENDANT: About thirty-six.

THE COURT: Did you hear the district attorney say that on April 30th, 1968, at about 7:40 p.m. on 136th Street between Amsterdam and Broadway, here in Manhattan, that you had a knife in your hand and that you stole a purse containing the sum of eight dollars from a lady whose name is Eleanor Evans? Did you hear him say that?

THE DEFENDANT: Yes, sir.

THE COURT: Did you threaten the lady with a knife if she didn't give you the money?

THE DEFENDANT: Yes, sir.

THE COURT: Had you ever seen this lady before in your life?

THE DEFENDANT: No, sir.

THE COURT: How old a lady was she, about?

THE DEFENDANT: About thirty-nine, forty.

THE COURT: About thirty-nine or forty. Why did

Plea

you steal the money from her?

THE DEFENDANT: I just wanted to steal it.

THE COURT: What?

THE DEFENDANT: I just wanted to steal it.

THE COURT: Were you alone when you did these things?

THE DEFENDANT: Yes, sir.

THE COURT: Were you working or were you still going to school?

THE DEFENDANT: I wasn't going to school. I was working.

THE COURT: What kind of work were you doing?

THE DEFENDANT: Teach people self-defense.

THE COURT: You teach people. Do you do it at some school or just on your own?

THE DEFENDANT: My own school.

THE COURT: Your own school?

THE DEFENDANT: Yes, sir.

THE COURT: What do you teach them? How do you teach them to defend themselves?

THE DEFENDANT: I teach them karate, gun foo.

THE COURT: What do all these things mean?

THE DEFENDANT: That's just self-defense.

Plea

THE COURT: That's karate?

THE DEFENDANT: That's karate.

THE COURT: Where did you ~~learn~~ learn it?

THE DEFENDANT: From my instructor.

THE COURT: When did you stop going to school?

THE DEFENDANT: Stopped going to school in '67.

THE COURT: And were you paid for teaching people self-defense?

THE DEFENDANT: Yes, sir.

THE COURT: But you had no regular job? You didn't work for anybody else?

THE DEFENDANT: No, sir.

THE COURT: Where did you teach these people?

THE ~~DEFENDANT~~ DEFENDANT: City College in the gym every Friday, Saturday night.

THE COURT: Now, has anyone made any threats to you which have induced you to enter these pleas of guilty to these two crimes?

THE DEFENDANT: No, sir.

THE COURT: Has your lawyer or the district attorney or anyone else made any promise to you as to what the sentence of the court will be?

THE DEFENDANT: No, sir.

Plea

THE COURT: Are you entering these two pleas of guilt voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: And are you entering these pleas of guilt because you did rape this girl on May 24th, 1968, and because you did rob this lady of her pocket-book on April 30th, 1968? Is that why you are entering the pleas?

THE DEFENDANT: Yes, sir.

THE COURT: And for no other reason?

THE DEFENDANT: No other reason.

THE COURT: Have you been examined by doctors since you were arrested?

THE DEFENDANT: YES, sir.

THE COURT: Where?

THE DEFENDANT: Right downstairs.

THE COURT: Right downstairs here?

THE DEFENDANT: Yes, sir.

THE COURT: Were you examined at Bellevue Hospital?

THE DEFENDANT: No, sir.

THE COURT: Do we have a ~~pm~~ psychiatric report on file, please, Mr. Yochelson?

Plea

THE CLERK: No indication, no.

THE COURT: How did you happen to pick this girl, this lady, to rape her? How did you happen to pick her out?

THE DEFENDANT: I just seen her.

THE COURT: Well, you saw many other women, didn't you?

THE DEFENDANT: Yes, sir.

THE COURT: Why did you pick on her? Any particular reason?

THE DEFENDANT: No particular reason.

THE COURT: You are not sorry at all that you did any of these things, Mr. Suggs?

THE DEFENDANT: Nothing to be sorry about.

THE COURT: What?

THE DEFENDANT: There is nothing to be sorry about.

THE COURT: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

THE DEFENDANT: If I did something and I did it there is nothing to be sorry about after I do it.

THE COURT: No matter what you do?

Plea

THE DEFENDANT: No matter what I do.

THE COURT: Well, of course, you knew that you were doing something that was illegal, to say nothing of immoral? You knew that, did you not, when you were doing that?

THE DEFENDANT: YES, sir, I knew that.

THE COURT: Arraign him on those two pleas. I will take the pleas.

THE CLERK: John Suggs, you are advised that if you have been previously convicted of two or more felonies that fact may be established hereafter, and when you plead guilty under these indictments you may be sentenced as a persistent felony offender. Do you ~~g~~ understand that?

THE DEFENDANT: Yes, sir.

THE CLERK: Do you now withdraw your plea of not guilty heretofore interposed by you and do you now plead guilty to the crime of rape in the ~~first~~ first degree under Indictment 3063 of 1968, and do you further plead guilty to the crime of robbery in the first degree under Indictment 3063A of 1968, those pleas to cover also indictment 2251 of 1968? Are those your pleas?

THE DEFENDANT: Yes, sir.

[Whereupon, the defendant was duly sworn and his pedigree was taken.]

THE COURT: Well, now, Mr. Suggs, you ~~know~~ know that you are going to be punished for these crimes, do you not?

THE DEFENDANT: Yes, sir.

THE COURT: Well, don't you think it might help you if you show that you are sorry, you show some compassion for your victims?

THE DEFENDANT: I tried that once.

THE COURT: What?

THE DEFENDANT: I tried that once.

THE COURT: You tried that once? When was that?

THE DEFENDANT: When I was small.

THE COURT: What happened when you were small?

THE DEFENDANT: I lost a finger because I tried.

THE COURT: You lost a finger, you say?

THE DEFENDANT: Part of it.

THE COURT: What happened then?

THE DEFENDANT: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was

sorry, she cut me.

THE COURT: Who ~~kinned~~ tried to cut you, your mother or your sister?

THE DEFENDANT: My mother.

THE COURT: Did you get in difficulties in school or no?

THE DEFENDANT: I didn't get in no difficulties in school.

THE COURT: You didn't have fights with other children or things like that?

THE DEFENDANT: No.

THE COURT: Set it down for investigation and sentence October 31st. I want a complete psychiatric examination and report on this boy. And for that purpose I wish to commit him on my motion to Bellevue Hospital for examination and report.

Mr. Tucker, do you feel that in view of what this boy has stated here today that an examination is in order?

MR. TUCKER: I think it would be in order, Your ~~HONOR~~ Honor, to help Your Honor and the court determine the sentence of this defendant. I would recommend that, Judge.

THE COURT: All right, committed to Bellevue Hospital for examination and report, psychiatric examination and investigation, and sentence 10-31, October 31, 1968.

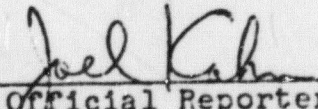
We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be -- whom are you mad at?

THE DEFENDANT: No one.

THE COURT: All right, see you on the 31st. Try to cooperate with the ~~men~~ doctors. See if they can help you.

- - -

I HEREBY CERTIFY that the foregoing is a true and correct transcript of my stenographic notes, taken during the foregoing proceedings in the case of The People of the State of New York against John Suggs, in the Supreme Court of the State of New York, County of New York, Special and Trial Term, Part 39, on September 13, 1969.



Official Reporter

(MINUTES OF SENTENCING, JUNE 6, 1969)

JA 26

SUPREME COURT: NEW YORK COUNTY

----- x
THE PEOPLE OF THE STATE OF NEW YORK

-against-

SENTENCE

3063/68

JOHN SUGGS,

Defendant

----- x
New York, N Y.
July 3, 1969

BEFORE: HON. MITCHELL D. SCHWITZER, Justice

Appearances:

For the Defendant: Jerome Tobin, Esq.,

Theodore Custer,
Official Court Reporter

THE COURT CLERK: John Suggs Three cases. 2251 of 1968, 3063 of 68 and 3063A of 68 Is your name John Suggs/

THE DEFENDANT: Yes, sir.

THE COURT CLERK: Is Mr Jerome Tobin who is present in court your lawyer.

THE DEFENDANT: Yes.

THE COURT CLERK: Now on indictment 3063 of 1968 you are arraigned before this Court for sentence on your plea of guilty to the crime of rape in the first degree On indictment No. 3063A of 1968, you are arraigned before this Court for sentence on your plea of guilty to the crime of robbery in the first degree . On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law/ You must answer.

THE DEFENDANT: Yes, I do

THE COURT CLERK: He says he has reasons why judgment should not be pronounced. your Honor. All right, speak.

THE DEFENDANT: Judge, at that time I wasn't capable of understanding the case.

THE COURT: I want the record to be crystal clear that this Court previously had adjourned these sentences until a later date in this month in order to afford his newly appointed assigned appellate division counsel to formalize

any application which his client desired to make to withdraw his plea of guilty, is that correct, Mr. Tobin?

MR. TOBIN: Yes

THE COURT: Is it also correct that two days ago, on Wednesday of this week you came to me and indicated that your client desired to withdraw such application?

MR. TOBIN: Correct

THE COURT: He wanted to abandon such plan and to accept the sentence in this case, is that correct?

MR. TOBIN: Yes.

THE COURT: Did I further indicate to you that in light of that I would advance the sentence date?

MR. TOBIN: Right, your Honor

THE COURT: Do you want a second call to talk to your client?

MR. TOBIN: No, your Honor He is not changing his plea He simply wants to explain what happened.

THE COURT: No The question which the clerk posed of him is this Does he have any legal cause to show why judgment of this court should not now be pronounced upon him.

THE DEFENDANT: No.

THE COURT: Now Mr Suggs, you understand what I did say with respect to the applications which your lawyer

had previously attempted to make on your behalf to withdraw your pleas of guilty, did you understand what I said?

THE DEFENDANT: Yes, sir

THE COURT: Did you understand I gave him this opportunity to make the application but that he came to me on Wednesday and he requested that I advance your sentence date because you no longer planned to withdraw your pleas of guilty, is that correct?

THE DEFENDANT: Yes, that's correct.

THE COURT: Now, so we will have no misunderstanding either at this time or in the future, do you wish to be sentenced today or do you want an adjournment of your sentence so you can confer again with your lawyer whether or not you want to withdraw your pleas of guilty?

THE DEFENDANT: I wish to be sentenced today

THE COURT: Then may I assume therefore, that after conferring with your lawyer you no longer plan to withdraw your pleas of guilty, is that correct?

THE DEFENDANT: That is correct.

THE COURT: All right, I am going to ask the clerk to pose the allocution again.

THE COURT CLERK: On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according

to law? You must answer.

THE DEFENDANT: No

THE COURT CLERK: Now either you or your attorney or both of you may speak further on your behalf. Do you wish to speak or you wish your lawyer to speak for you?

THE DEFENDANT: I wish my lawyer to speak

MR. TOBIN: Your Honor, the defendant is throwing himself on the mercy of the Court, and I wish to make some remarks, facts that he told me about the facts that I have learned. why there should be mitigating circumstances here. He tells me that when he was five years of age he fell down a flight of stairs and injured his head, and that when he was eight years old he had rheumatic fever and was taken to Knickerbocker Hospital. In 1956 the record shows he spent one month in Bellevue psychiatric ward. That is when he was fifteen years old. He is a product of a broken home; and at the time he was eleven years of age he lived with an aunt, and the aunt worked, and he was pretty much left on his own. He claims that in February 1967 he was told by his teacher or someone in the school in charge not to come back any more. He didn't come back any more. He afterwards was arrested and sent to West Hampton -- was sent to Hampton Farms. he was there for a year and two weeks. Now at West Hampton Farms he became a user of drugs and I wish to see

this, your Honor. I have talked to a woman whose son was there, and she told me that drugs are freely brought to Hampton Farms on visiting days by visitors, because when they bring packages there is no examination of the packages. After he got out of West Hampton Farms his criminal career started and as the Court is well aware of he has been sentenced, he was committed to Bellevue in 1968, in July where he spent several months, and at the time the psychiatrist stated he wasn't competent to understand or wasn't properly or mentally equipped to stand trial. However, as your Honor knows, he was re-examined, last month and at that time the psychiatrist said he is able to stand trial. However although he is able to stand trial he has some mental difficulties, paranoia, for one, according to the report, and I ask the Court to take all these facts into consideration, in that although he has sinned against society by reason of circumstances of his youth and his surroundings, and inability to get proper guidance, he fell on the error of his ways. He told me while attending school he did work for an uncle on a painting job, his uncle is a painter and he worked while going to school, and on vacation. But after he came from Hampton Farms he seems to change altogether, and I might add in closing that although I feel he has committed

heinous crimes and has sinned against society, there is the thought in my mind that society also has sinned against him, and I ask the Court to consider all these facts and in pronouncing sentence on him

THE COURT: This defendant pleaded guilty to rape in the first degree under indictment 3063-62 and robbery in the first degree under indictment 3063A 62 to cover two indictments. The pleas to the rape in the first degree, robbery in the first degree covered a series of robberies and rapes. There is nothing to mitigate the offenses themselves in the pre sentence report, and the only mitigation if one may refer to it is the fact that there is an absence of any criminal record, and the defendant does have a deprived background, and the further fact that at the time of the commission of these crimes he was about seventeen years of age. The defendant is sentenced to an indeterminate term of imprisonment the minimum of which shall be five years and the maximum fifteen years on each conviction, to run concurrently and not consecutively. He is committed to the custody of the New York State Department at Elmira, New York, there to be dealt with in accordance with the laws pertaining to this sentence. I want the record to show that in imposing the minimum sentence of five years I do so

because of the nature of the offenses, because of the defendant's negative attitude and his present antisocial orientation. All of these factors combined to convince the Court that he should remain in custody for a minimum of five years prior to meeting the parole board. Remand the defendant. Will you advise him of his right to appeal

MR. TOBIN: Mr Suggs, if you wish to appeal you must do so within thirty days from the date of this sentence.

CERTIFIED that the foregoing is a true and accurate transcript of the minutes.

Theodore Custer
Theodore Custer,
Official Court Reporter

JA 34

(OPINION OF THE DISTRICT COURT, FEBRUARY 25, 1975)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA
ex rel. JOHN SUGGS,

Petitioner,

-against-

J. EDWIN LA VALLEE, Superintendent,
Clinton State Correctional Facility,
Dannemora, New York,

Respondent.
-----x

OPINION

72 Civ. 4336

41945

APPEARANCES:

JUDSON A. PARSONS, JR., ESQ.
Attorney for Petitioner

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

By: Stanley L. Kantor, Esq.
Deputy Asst. Attorney General
of Counsel

KEVIN THOMAS DUFFY, D.J.

The petitioner, a state prisoner presently incarcerated in the Auburn Correctional Facility, makes application pursuant to Title 28, United States Code, Section 2254, for a writ of habeas corpus in order to secure a new trial,

MICROFILM

FEB 26 1975

or, in the alternative, an evidentiary hearing, relating to the involuntary nature of his plea of guilty to the crimes of rape in the first degree and robbery in the first degree, in Supreme Court, New York County, for which he was sentenced on June 6, 1969, to two concurrent indeterminate terms of five to fifteen years imprisonment.

I find that petitioner has complied with the requirement of 28 U.S.C. 2254(b) that he first exhaust state court remedies before presenting his claims to the federal courts.

His initial appeal, limited to the issue of his right to a competency hearing at the time of sentencing, was denied by the Appellate Division, People v. Suggs, 35 App. Div.2d 781 (1st Dept. 1970), with leave to appeal to the New York Court of Appeals denied on November 6, 1970.

He also filed an application for a writ of error coram nobis in Supreme Court, New York County, again raising the issue of his right to a competency hearing at the time of sentencing. This petition was denied in August 1970, and no appeal was taken therefrom.

Shortly after the institution of his habeas petition, counsel was assigned by this Court and the Court suspended consideration on the merits until such time as petitioner returned to the state courts to exhaust on the issue

of the sentencing court's failure to afford the colloquy on voluntariness mandated by Boykin v. Alabama, 395 U.S. 238 (1969).

Accordingly, petitioner filed a motion to vacate the judgment in Supreme Court, New York County, which was denied on December 6, 1973, with leave to appeal to the Appellate Division denied on March 5, 1974.

Thus, there has now been a proper exhaustion of state court remedies, 28 U.S.C. 2254(b); both procedurally, Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); and as to the specific subject matter raised in the petition, Picard v. Connor, 404 U.S. 270, 275 (1971); United States ex rel. Nelson v. Zelker, 465 F.2d 1121 (2d Cir.), cert. denied, 409 U.S. 1045 (1972).

The basic question presented is whether petitioner was deprived of due process of law by virtue of the sentencing court's failure to inquire into the voluntariness of his original guilty plea, in light of his having been found incompetent immediately after his initial plea.

Petitioner was originally charged in an eighteen-count indictment with various counts of rape in the first degree, sodomy in the first degree, robbery in the first degree, and possession of a weapon. A second indictment charged him with additional counts of robbery.

In spite of his relative youth (age 17) and lack of a prior criminal record, he was denied Youthful Offender Status on August 1, 1968, and appeared in Supreme Court, New York County, on September 13, 1968, in order to plead to the indictment. Petitioner, represented by the Legal Aid Society, withdrew his prior plea of not guilty and offered to plead guilty to one count of rape, first degree, and one count of robbery, first degree, in full satisfaction of the indictments. The prosecution recommended acceptance of the proffered plea.

Before accepting the plea, the court entered into a colloquy with petitioner as to his understanding of the plea, and as to whether or not there was a factual basis for the plea. During the course of this colloquy, petitioner responded affirmatively when asked whether he had heard the facts of the crimes as related by the District Attorney and he admitted them. He also stated that he had consulted with his attorney. The court at that time asked him whether his guilty plea was voluntary and whether threats or promises were made to induce him to plead. He responded appropriately.

It is to be noted, however, that the court on that occasion made no inquiry whatsoever into whether petitioner understood what specific constitutional rights he would be waiving by pleading guilty. Moreover, there is no indication

whatever on the face of the plea minutes that petitioner was ever informed of the potential maximum sentence which might be imposed upon his guilty plea, or of the possibility that he would have to serve a minimum sentence before being eligible for parole. However, in light of this Court's disposition, infra, it is unnecessary to rule upon whether petitioner fully understood the consequences of the plea at that time.

Upon satisfying itself as to the plea's voluntariness, the court thereupon began to inquire into whether petitioner felt any remorse for his acts. After engaging in a bizarre colloquy, reproduced in the Appendix, infra, the court sua sponte, with the consent of petitioner's counsel, ordered him to Bellevue Psychiatric Hospital for a psychiatric examination and report, pursuant to Sec. 658, et seq., of the then-Code of Criminal Procedure (now Article 730, Criminal Procedure Law).

However, the court still accepted petitioner's guilty plea and set October 31, 1968, for sentencing.

Petitioner was committed forthwith to Bellevue and a report to the court was completed on October 21, 1968. The report revealed that petitioner had a long history of behavior problems, including residence at Wiltwyck Treatment Center and Hampton State Training School, and that "His history of behavior reveals that he has characteristically

reacted to feelings of persecution by retaliation." Diagnosing petitioner as suffering from "Schizophrenia, Paranoid Type", the two qualified psychiatrists who examined him found him to be "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense." Cf., Sec. 658, C.C.P.

Pursuant to Sec. 662-b, C.C.P., the court, after a hearing, found petitioner incompetent to stand trial and committed him to the custody of the Commissioner of Mental Hygiene on November 6, 1968. On November 15, 1968, petitioner was committed to Matteawan State Hospital.

On April 4, 1969, the Superintendent of Matteawan filed a report with the court, certifying that petitioner was "no longer in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or making his defense thereto." The Superintendent's report, containing a history of petitioner's psychiatric background and progress, diagnosed his condition as Psychosis with Antisocial Personality, Paranoid and Reactive Features. The report stated that at a recent staff presentation, petitioner was attentive and cooperative and was able to give a coherent and relevant account of the events leading to his arrest.

Upon the basis of that report alone petitioner was certified as competent on April 9, 1969, and he wa thereupon returned to court for sentencing.

On June 6, 1969, petitioner appeared with newly appointed counsel for sentencing. Upon being asked by the court whether there was any legal cause why judgment should not be pronounced at that time, petitioner replied that at the time of his original plea, he wasn't capable of understanding the case.

The court then reiterated to petitioner that it had previously adjourned the sentencing in order to give petitioner's counsel an opportunity to make any applications he deemed advisable with regard to withdrawing his plea. The court reminded petitioner that his attorney had informed the court earlier that week that petitioner did not wish to withdraw his plea. The court then inquired of defendant personally, whether he wished to withdraw his plea or proceed with sentencing. Petitioner asked to be sentenced and indicated that he specifically did not wish to withdraw his plea. Thereupon, making no further inquiry into the voluntariness or factual basis for the plea, the court sentenced petitioner to a term of five to fifteen years."

Petitioner argues that under the circumstances of the present case, the fact that his initial guilty plea was

entered at a time when he was incompetent voids the actual plea and all proceedings relating thereto under the rule of Pate v. Robinson, 383 U.S. 375 (1966) and McCarthy v. United States, 394 U.S. 459 (1969), and that, furthermore, the actual sentencing was improper because no inquiry was made as to whether petitioner's previous void plea (or his decision not to move to withdraw it) was voluntary, as required by Boykin v. Alabama, 395 U.S. 238 (1969), decided just four days before sentence was imposed.

Such an argument is indeed substantial, and under the exigent circumstances of this case, I am constrained to sustain these contentions.

It is clear that the conviction of a defendant while he is legally incompetent violates due process. Pate v. Robinson, *supra*; Bishop v. United States, 350 U.S. 961 (1956). Similarly, it is equally clear that in order for a guilty plea to be valid, such a plea must be knowing and voluntary. Kercheval v. United States, 274 U.S. 200 (1927); McCarthy v. United States, *supra*; United States ex rel. Leason v. Damon, 496 F.2d 718, 721 (2d Cir. 1974).

The appropriate standard with regard to a guilty plea is that:

" . . . [I]t must be an 'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." McCarthy v. United States, supra, 394 U.S. at 466.

The application of such a standard to the plea of a defendant who is declared incompetent immediately after having been remanded for psychiatric examination upon the basis of his colloquy with the court at the time of the plea manifestly negates the validity of any such plea. As the Supreme Court stated in an analogous situation:

" . . . [I]t is 'contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."

Pate v. Robinson, supra, 383 U.S. at 384.

Respondent's sole answer to this argument is to attempt to persuade the court that no proof has been adduced that petitioner actually was incompetent at the time of his initial plea, and that, given the time delay between the date of the plea and the psychiatric report -- five weeks -- there is no clear-cut evidence that petitioner was actually incompetent on the day of the plea.

Such an argument is transparent sophistry. Petitioner was remanded for examination because of his bizarre responses at the plea itself. Moreover, the record reveals that he was sent to Bellevue on the very date of the plea. The date of the psychiatric report to the court is merely the date upon which the psychiatrists reported their findings, not the date of their examinations.

Such a psychiatric report, and its subsequent ratification by the court, attesting to a defendant's incompetency, must be interpreted as conclusively invalidating any plea that constitutes a voluntary relinquishment of rights made at a time when a defendant is suffering under such a disability. United States ex rel. Smith v. Baldi, 344 U.S. 561 (1953); United States ex rel. Kaye v. Zelker, 355 F.Supp. 1002 (S.D.N.Y. 1972), aff'd, 474 F.2d 1336 (2d Cir. 1973).

Thus, as any plea that is taken by a defendant at a time when he is incompetent must be treated as a nullity, as is conceded in this case by the respondent, the Court must next consider whether the sentencing court's attempted ratification of the previous guilty plea sufficiently delved into the question of the ratification's voluntariness to meet the standards imposed by Boykin v. Alabama, supra.

The Supreme Court in Boykin specifically enumerated that among the rights waived by a defendant who pleads guilty are the constitutional rights to a jury trial, confrontation by his accusers, and the privilege against self-incrimination. 395 U.S. at 243. The Court stated that waiver cannot be presumed from a silent record, holding that the prerequisites of a valid waiver must appear on the record:

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

Id., at 242

The question of how explicitly a defendant must be shown to have waived these rights is, however, not susceptible of clear-cut definition. While several circuits have held that the record need not reflect that the waiver of the three constitutional rights enumerated in Boykin need be explicit, Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973) (en banc); Todd v. Lockhart, 490 F.2d 626 (8th Cir. 1974); other circuits have held that there must be an affirmative showing of explicit waiver, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973);

Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); Moore v. Anderson, 474 F.2d 1118 (10th Cir. 1973).

While this Circuit has not yet specifically ruled on the question, it has seemingly indicated sympathy with the latter interpretation in United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1102 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), wherein the Court stated in dictum that the states would appear to have imposed upon them the requirements of demonstrating voluntariness consonant with Rule 11, F.R.Cr.P. by Boykin.^{*} However, the Court declined to so rule on that occasion on the ground that the guilty plea in question predated Boykin, and the Circuit had previously held it to be non-retroactive. United States ex rel. Rogers v. Adams, 435 F.2d 1372 (2d Cir. 1970), cert. denied, 404 U.S. 834 (1971).

The facts of the instant case throw the question of non-retroactivity of Boykin into sharp relief, for, while the initial plea occurred some nine months before that decision, the sentencing took place four days afterward. Thus, given the previous incompetency of petitioner, rendering his

^{*} Cf., United States ex rel. Hill v. Ternullo, ___ F.2d ___, (74-2351, 2d Cir. 2/10/75) at 1756, fn.1.

guilty plea a nullity, this Court must apply Boykin standards in determining whether the purported ratification at sentencing of the earlier plea sufficiently rehabilitated it in order for it to remain valid.

Inspection of the sentencing minutes reveals a complete absence of any meaningful inquiry into the voluntariness of petitioner's earlier plea. The sentencing court's sole inquiry was directed to the question of whether petitioner wished to withdraw his earlier plea. Upon the defendant's acquiescence in the earlier plea, the court proceeded without any further inquiry of its own into the original plea's voluntariness or the voluntariness of a now-competent defendant's ratification of a plea made when he was incompetent. No inquiry whatever was made of petitioner at any time during which he was competent as to whether any promises had been made to him, whether he had been coerced, whether he was acting under his own free will either with respect to his invalid plea or his decision not to withdraw it.

Moreover, no inquiry was made of the defendant, now that he was competent, as to whether there was a proper factual basis for his plea. United States ex rel. Dunn v. Casseles, 494 F.2d 397 (2d Cir. 1974); McCarthy v. U.S., supra.

Respondent argues that petitioner's waiver of the opportunity to make a motion to withdraw his plea at the time of sentencing operates as both a ratification of the earlier plea and a waiver of his objections to that plea's voluntariness, citing United States ex rel. Callahan v. Follette, 418 F.2d 903 (2d Cir. 1969), cert. denied, 400 U.S. 840 (1970).

Such an argument is plainly untenable upon the facts of this case. Callahan concerned a guilty plea, valid on its face, that was being attacked upon the grounds of unfulfilled promises by either the court or the prosecution, a situation in which the defendant clearly has the burden of proof. Callahan was held to have waived any objection to his plea by his failure to take the opportunity afforded by the court for a formal motion and determination of his request for withdrawal.

Furthermore, respondent's suggestion that the 1968 plea minutes in this case be read in conjunction with the 1969 sentencing minutes clearly flies in the face of both Pate v. Robinson, supra, and McCarthy v. United States, supra.

It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to

stand trial, such a plea must be considered null and void, and upon the attainment of competency, he must be given an opportunity to re-plead to the charges.

Furthermore, should the trial court, alternatively, wish to provide a newly-competent defendant an opportunity to ratify his earlier plea, a full and complete inquiry must be made by the court on that later occasion to determine the voluntariness of that ratification, the voluntariness of the plea itself, and further inquiry must once again be made of the now-competent defendant as to whether there is a proper factual basis for the plea.

Applying these principles to the instant facts, it is manifest that no such inquiry as to the voluntariness of the ratification, the plea itself, or any factual inquiry was made of the defendant at the time of sentencing. Thus, if the 1968 plea is deemed a nullity by virtue of defendant's incompetence, the court must look to the sentencing minutes, which are utterly inadequate to make any finding of waiver of rights, pursuant to Boykin.

In attempting to fashion the appropriate remedy in this case, the Court is not unmindful of the fact that in most cases a hearing may be held by the District Court in an attempt to cure the defects of the plea. U.S. ex rel. Leeson v. Damon, supra; Green v. Wingo, 454 F.2d 52, 54 (6th Cir. 1972).

However, a hearing is not always mandated, and there is authority for the Court to hold that an inadequate record alone may justify relief from a guilty plea, Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); Perry v. Crouse, 429 F.2d 1083 (10th Cir. 1970). This would appear to be the wiser course in this case, dealing as we are with a void guilty plea and a grossly inadequate post-Boykin attempted ratification of that plea. The holding of a hearing in this case in order to flesh out a virtually non-existent record would be an exercise in futility. Rather, petitioner should be given the opportunity, albeit belated, to properly replead to the indictments in question.

In light of the foregoing disposition, it is unnecessary for me to decide whether, under any and all circumstances, the failure of a sentencing court to hold a competency hearing, sua sponte, where none has been requested, and where the record at the time of sentencing did not indicate that the petitioner was manifesting any psychiatric symptomatology, violated due process.

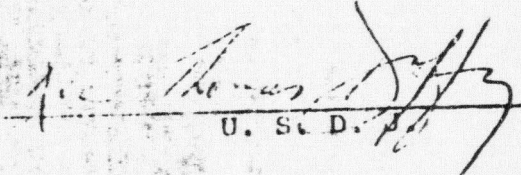
Suffice it to say, Pate v. Robinson, supra, does not mandate a competency hearing regardless of the evidence and whether or not the defendant requests one. United States ex rel. Evans v. LaVallee, 446 F.2d 782 (2d Cir. 1971);

United States ex rel. Roth v. Zelker, 455 F.2d 1105 (2d Cir.), cert. denied, 408 U.S. 927; United States ex rel. Curtis v. Zelker, supra.

Upon careful scrutiny of this record as well as petitioner's failure to particularize in what way he was prejudiced by this omission, the sentencing court's refusal to hold a competency hearing, sua sponte was well within the proper exercise of its discretion.

Accordingly, petitioner's plea of guilty is vacated, and the writ of habeas corpus shall issue sixty days from the date of this opinion, unless within that time petitioner is allowed to re-plead in the State court upon the indictments in question.

The Court wishes to express its appreciation to Judson A. Parson, Jr., Esq., assigned counsel, for his assistance in this case.


U. S. D.

Dated: New York, New York
February 25, 1975.

APPENDIX

The Court: You are not sorry at all that you did any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

The Defendant: If I did something and I did it there is nothing to be sorry about after I do it.

The Court: No matter what you do?

The Defendant: No matter what I do.
(Plea minutes, pp. 17-18).

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

APPENDIX - continued

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.
(Id. at pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be --- whom are you mad at?

The Defendant: No one.
(Id. at p. 21).

(OPINION OF THE COURT OF APPEALS, AUGUST 7, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1012—September Term, 1974.

(Argued May 7, 1975 Decided August 7, 1975.)

Docket No. 75-2049

UNITED STATES OF AMERICA ex rel. JOHN SUGGS,
Petitioner-Appellee,
v.

J. EDWIN LA VALLEE,
Respondent-Appellant.

Before:

FEINBERG, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from an order entered in the Southern District of New York, Kevin T. Duffy, *District Judge*, on state prisoner's petition for a writ of habeas corpus, vacating his pleas of guilty and directing that the writ issue in sixty days unless the prisoner is permitted to replead in the state court within that time.

Vacated and remanded.

DAVID R. SPIEGEL, Asst. Atty. Gen. of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Atty. Gen., and Samuel A. Hirshowitz, First Asst. Atty. Gen., New

York, N.Y., on the brief), for *Respondent-Appellant*.

JUDSON A. PARSONS, JR., New York, N. Y. (Robert J. Costello, New York, N.Y., on the brief), for *Petitioner-Appellee*.

TIMBERS, *Circuit Judge*:

The State of New York appeals from an order entered February 25, 1975 in the Southern District of New York, Kevin T. Duffy, *District Judge*, 390 F. Supp. 383, on a state prisoner's petition for a writ of habeas corpus, vacating his pleas of guilty and directing that the writ issue in sixty days unless the prisoner is permitted to replead in the state court within that time.

With the benefit of the hindsight that the district court did not have, we vacate its order and we remand the case for an evidentiary hearing—by either the state court or the district court, as the latter may determine—on the prisoner's competence at the time his guilty pleas were entered, in the light of two psychiatric reports which were not before the district court at the time the order now before us was entered.

In two indictments filed July 30, 1968, John Suggs was charged with various counts of rape, sodomy, robbery and possession of a weapon. The charges arose from two separate incidents of violence which took place in New York City on April 28 and May 24, 1968. He pleaded not guilty to all charges on *August 1, 1968*.

On September 13, 1968, when he was 17 years of age and while represented by The Legal Aid Society, Suggs appeared before Justice Nunez in the New York Supreme Court. On this date he withdrew his pleas of not guilty and pleaded guilty to one count of rape and one count

of robbery in satisfaction of both indictments. Before accepting Suggs' guilty pleas, Justice Nunez conducted an extensive voir dire examination of Suggs to determine whether he understood what he was pleading to, whether there was a factual basis for the pleas, and whether the pleas were voluntary. Suggs' responses indicated that he understood the charges, that there was a factual basis for his pleas and that he was pleading voluntarily. He admitted all of the alleged facts and even volunteered information.

During the course of the court's questioning, however, Suggs refused to admit that he felt any remorse for what he had done. After accepting his pleas on September 13, therefore, Justice Nunez ordered a psychiatric examination of Suggs for sentencing purposes. For aught that the record before us discloses, neither at that time nor at any time prior to the instant appeal was anyone who had anything to do with Suggs' case aware of a psychiatric report which was furnished to the New York Supreme Court by Dr. Emanuel Messinger under date of July 23, 1968 and which stated that Suggs was "without psychosis and of average intelligence".

Pursuant to Justice Nunez's order following his acceptance of the guilty pleas, Suggs was given a psychiatric examination. On October 21, 1968, the report of this examination was transmitted to the New York Supreme Court by Drs. Martin I. Labin and Laszlo Kedar. They stated that Suggs was a paranoid type schizophrenic and that he was "incapable of understanding the charge, proceedings or making his defense". Acting on this report, Justice Gold of the New York Supreme Court entered an order on November 6, 1968 finding Suggs "incapable of understanding the charge or proceedings against him, or of making his defense thereto" and committing him to the custody of the Commissioner of Mental Hygiene.

On April 4, 1969, after drug therapy, Suggs was declared competent to stand trial. He was returned for sentencing. At the request of Suggs' newly appointed counsel, he was reexamined. On May 20, 1969, Dr. Messinger, who had written the July 23, 1968 report to the court, reported again that Suggs was not psychotic.

On June 6, 1969, Suggs appeared for sentencing before Justice Schweitzer in the New York Supreme Court. Sentencing had been adjourned once to allow Suggs to withdraw his pleas of guilty. Two days before the hearing which was scheduled for that purpose, Suggs' counsel informed the court that Suggs wished to abandon his application to withdraw his pleas and would accept sentence. At the sentencing proceedings, however, Suggs again indicated that he wanted to withdraw his pleas. But when the court gave him an explicit opportunity to make such an application, he declined to do so. Suggs thereupon was sentenced to a term of imprisonment of five to fifteen years.

He appealed to the Appellate Division on the issue of his right to a competency hearing at the time of sentencing even though he had not requested one. His conviction was affirmed without opinion on October 13, 1970. *People v. Suggs*, 35 App. Div. 781, 314 N.Y.S.2d 981 (1st Dept. 1970). On November 6, 1970, leave to appeal to the New York Court of Appeals was denied.

In the meanwhile, Suggs also had filed an application in the New York Supreme Court for a writ of error *coram nobis*, in which he again raised the issue of his right to a competency hearing at the time of sentencing. This petition was denied on August 18, 1970. No appeal was taken.

On October 13, 1972, acting pro se, Suggs filed the instant petition for a writ of habeas corpus in the Southern District of New York. He claimed, under *Pate v. Robinson*, 383 U.S. 375 (1966) (decided prior to his 1969 sentencing),

that the state court should have ordered a hearing *sua sponte* on his competency to reaffirm his pleas of guilty. The district court appointed counsel to represent him.

On July 19, 1973, the petition for a writ of habeas corpus by stipulation was placed on the suspense calendar to allow Suggs to return to the state courts to raise the new issue of the sentencing court's alleged failure to conduct the inquiry on voluntariness claimed to be required by *Boykin v. Alabama*, 395 U.S. 238 (1969). *Boykin* was decided on June 2, 1969, four days before Suggs was sentenced in the instant case.

On December 6, 1973, Justice Sandifer, in the New York Supreme Court, filed an opinion which denied Suggs' motion to vacate his judgment of conviction based on his *Boykin* claim and which stated:

"The thrust of defendant's argument is that at this point in the face of the defendant's categorical refusal to withdraw his plea in open court in the presence of counsel, that the court, *sua sponte*, should have set his plea aside for the sole purpose of inquiring of him whether his pleas were 'intelligent and voluntary' (*Boykin v. Alabama, supra*) despite the fact that at the time his original pleas were taken (September 13, 1968), it is far from clear that the defendant was incompetent.

It will suffice to say that we do not read *Boykin* so as to require this procedure in this case. . . . Applying [the *Boykin*] standard to this case we find that the evidence is overwhelming that the defendant by his guilty pleas knowingly, intelligently and voluntarily waived his constitutional right against self-incrimination under the Fifth Amendment, his right to trial by jury . . . , and his right to confront his accusers . . . , and that this motion is in all respects denied." (citations omitted).

On March 5, 1974, leave to appeal to the Appellate Division from Justice Sandifer's order was denied.

Following removal of the case from the suspense calendar in the district court, Judge Duffy filed an opinion on February 25, 1975 granting the relief stated above. The court's order vacating Suggs' pleas of guilty was based on the report by Drs. Lubin and Kedar dated October 21, 1968 which stated that Suggs was psychotic. The court concluded without an evidentiary hearing that the only possible inference was that Suggs was incompetent at the time of his pleas and that his pleas therefore were invalid under *Pate v. Robinson, supra*, and *McCarthy v. United States*, 394 U.S. 459 (1969). 390 F. Supp. at 387.¹

At the time of its decision, the district court did not have before it the two reports of psychiatric examinations of Suggs by Dr. Messinger dated July 23, 1968 and May 20, 1969, each of which stated that Suggs was not psychotic. These were not discovered by the State until April 1, 1975 when it searched the dead records file of the Psychiatric Clinic of the Supreme Court. This was after the State had filed its notice of the instant appeal. On April 15, 1975, we ordered that argument of the appeal be expedited and granted the State's motion to amend the record by including the two Messinger reports.

¹ Once the district court had concluded that Suggs' guilty pleas were invalid, it then considered whether the court which sentenced Suggs on June 6, 1969 had inquired sufficiently into the voluntariness of his pleas to fulfill the requirements of *Boykin v. Alabama, supra*, i.e. the claim which Justice Sandifer had rejected. It held that the minutes of the sentencing proceedings were "utterly inadequate to make any finding of waiver of rights, pursuant to *Boykin*". 390 F.Supp. at 389. It also rejected the State's argument that Suggs had ratified his earlier plea by refusing to withdraw it when given the opportunity to do so by the sentencing court. In view of our disposition of the case, we find it unnecessary to reach these issues.

Nor do we reach Suggs' claim that the sentencing court should have held a competency hearing *sua sponte*. This claim was rejected by the district court. 390 F.Supp. at 389-90. It has not been pressed on appeal.

We believe that the report dated July 23, 1968 may well be of critical importance to the determination of Suggs' competence at the time of his pleas. In reporting that Suggs was not psychotic, it flatly contradicts the Lubin-Kedar report of October 21, 1968, made three months later. The two reports raise an issue of fact as to Suggs' competence when he pleaded guilty on September 13, 1968. If the district court had had the July 23, 1968 report, it undoubtedly would have held an evidentiary hearing on Suggs' petition before ruling on it.

In view of the fact that Suggs' petition has been pending in the district court since October 13, 1972 and the case already has had one trip to the state courts to allow Suggs to exhaust his state remedies, we think it is most unfortunate that Dr. Messinger's report was not located until April 1, 1975. But in view of the importance of this report to the factual issue involved, the only appropriate course open to us is to remand the case for an evidentiary hearing.

One of the puzzling aspects of this case is that it is not clear from the record whether the issue of Suggs' competency *at the time of his guilty pleas* actually has been presented to the state courts. His direct appeal and *coram nobis* proceeding appear to have raised the issue of his right to a competency hearing *at the time of sentencing*. His motion to vacate judgment before Justice Sandifer raised his *Boykin* claim. We suggest that the district court give consideration to affording the state court an opportunity initially to hold the evidentiary hearing which we find is required. See *Jackson v. Denno*, 378 U.S. 368, 393-96 (1964); *Iverson v. State of North Dakota*, 480 F.2d 414, 428 (8 Cir.), *cert. denied*, 414 U.S. 1044 (1973).

We leave to the discretion of the district court, however, whether the evidentiary hearing should be held initially by the state court or the district court. We have

confidence in the district court's ability to balance the competing interests here involved: on the one hand, the congressional policy of requiring exhaustion of available state remedies; and on the other, the equally important policy of not exhausting state prisoners who seek to assert, their federal constitutional rights. In any event, we suggest that whichever court holds the evidentiary hearing should consider the advisability of taking testimony not only from the psychiatrists who examined Suggs but also from others who observed him during the critical period, including his lawyer at that time and the assistant district attorney who handled the case. *Iverson v. State of North Dakota*, *supra*, 480 F.2d at 427.

Vacated and remanded.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
UNITED STATES OF AMERICA ex rel.
JOHN SUGGS,

Petitioner,

-against-

J. EDWIN LaVALLEE, Superintendent,
Clinton State Correctional Facility,
Dannemora, New York,

Respondent.
-----X

MEMORANDUM AND ORDER

72 Civ. 4336

#43022

APPEARANCES:

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Attorneys for Petitioner

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First Assistant Attorney General
DAVID R. SPIEGEL, ESQ.
Assistant Attorney General
Both of the offices of
HONORABLE LOUIS J. LEFKOWITZ,
Attorney General, State of New York
Attorneys for Respondent.

FILED
U.S. DISTRICT COURT
SEP 3 10 19 AM '75
S.D.N.Y.
(W)

KEVIN THOMAS DUFFY, D.J.

This case is before this Court on remand from the Second Circuit which vacated my prior order granting a writ of habeas corpus. The full facts of the case will be found at 390 F. Supp. 383 (S.D.N.Y. 1975); and in the opinion of the Court of Appeals, __ F.2d __ (2d Cir., filed August 7, 1975).

Basically, Suggs is in custody of New York State officials pursuant to a judgment of conviction and sentence after his return from Matteawan State Hospital for the Criminally Insane and plea of guilty which he submitted immediately prior to being committed for hospitalization. It was the holding of this Court that the plea must be either reopened or at least reaffirmed before sentence could be imposed.

On appeal, the Assistant Attorneys General listed above requested leave to expand the appellate record to include two psychiatric reports which directly contradict the report upon which this commitment to Matteawan State Hospital for the Criminally Insane was imposed. Under these circumstances, the Court of Appeals of this circuit has directed that a hearing be held and left to my discretion where to hold such a hearing.

At such a hearing it will be necessary for Mr. Justice Nunez to be called as a witness to ascertain whether he had knowledge of the facts and circumstances surrounding the psychiatric reports which were not revealed to me until the opinion of the Court of Appeals had been filed.

Of course, if Mr. Justice Nunez had such reports, he would have held a hearing before committing the man to psychiatric care. There was no record before this Court of such a hearing. If Mr. Justice Nunez had knowledge of such

reports without holding a hearing and making independent findings and yet committed the man, a serious constitutional question may be raised which up to this point has been unknown to any of the parties to the matter. See Jackson v. Indiana, 406 U.S. 715, 738 (1972); cf. O'Connor v. Donaldson, 43 U.S.L.W. 4929 (June 26, 1975).

The second group of witnesses that must be called include the Assistant Attorneys General who handled this matter, particularly with respect to the existence or non-existence of the records of such a hearing and commitment. It would be a travesty^{*/} if they were not called, and by further omission to state material facts the matter would have to be considered by some court.

Third, Mr. Justice Sandifer, who denied petitioner's motion to vacate judgment, must also be called as a witness to find out whether he had knowledge of these reports and what action, if any, he took in connection therewith. In view of the fact of his lengthy opinion on the first remand from this Court, which contains absolutely no mention of the

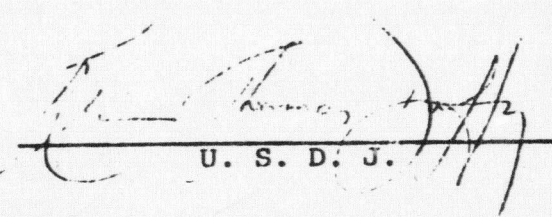
^{*/} It is heart-sickening for all courts to be faced with "newly discovered evidence" after a full and fair hearing, particularly where the evidence apparently could have been obtained before the hearing. It is particularly annoying both to trial and appellate judges that the record was expanded upon appeal to include such without even the appellant's requesting remand to the trial court to avoid such a waste of judicial time.

JA 64 4.

reports, it would appear that he had no knowledge of them. Of course, the parties may wish to call other witnesses.

Since the necessary witnesses will include Justices of the Supreme Court, it appears to me that the proper forum for taking their testimony would be the Supreme Court of the State of New York. Accordingly, the matter is remanded to that Court with the request that appropriate Administrative Justice assign it for hearing. It would be appreciated if the state court action could be completed within 90 days.

The remand is so ordered.



U. S. D. J.

Dated: New York, New York

September 2 1975.

(OPINION OF THE NEW YORK STATE SUPREME
COURT, DECEMBER 3, 1975)

JA 65

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 38

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

JOHN SUGGS,

Defendant.

Indictment Nos.
3063/68
3063A/68
2251/68

-----X
MELIA, J.:

This defendant was indicted in May and July of 1968 on three indictments charging multiple unrelated crimes of rape, sodomy, robbery, assault and larceny.

On September 13, 1968 he pleaded guilty to rape in the first degree and robbery in the first degree in satisfaction of all charges. On June 6, 1969 he was sentenced thereon to two indeterminate terms of imprisonment of from five to fifteen years to run concurrently.

He appealed to the Appellate Division, First Department, on the limited issue of his right to a competency hearing at the time of sentence. This appeal was denied (People v. Suggs, 35 A D 2d 781 [1970]). Leave to appeal to the New York Court of Appeals was denied on November 6, 1970.

The defendant then filed a writ of error coram nobis in this court, alleging the same ground. This petition was denied.

He then sought a writ of habeas corpus in the United States District Court for the Southern District of New York. Proceedings therein were suspended pending a return to this court for a determination "of the issue of the sentencing court's failure to afford the colloquy on voluntariness mandated by Boykin v. Alabama, 395 U.S. 82."

Such a petition was brought in this court and denied on December 6, 1973, by Sandifer, J. Leave to appeal was denied on March 5, 1974. The habeas corpus petition then proceeded in the federal court.

The United States District Court then vacated the guilty pleas, and as a consequence thereof the sentences imposed, and granted the writ of habeas corpus unless within sixty days the petitioner was permitted to replead to the indictments in this court.

The District Court based its decision on the ground that the pleas of guilty were null because of incompetency and the attempt at ratification of the prior pleas at the time of sentence did not meet the Boykin standard (United States ex rel. Suggs v. La Vallie, 390 F. Supp. 383 [1975]).

The People appealed this decision to the United States Court of Appeals for the Second Circuit. The United States Court of Appeals vacated the order of the District Court and remanded "the case for an evidentiary hearing . . . on the prisoner's competence at the time of his guilty pleas were entered, in the light of two psychiatric reports which were not before the district court at the time the order now before us was entered."

Consequently this case is now here on remand from an order of the United States District Court for the Southern District of New York for a hearing, pursuant to the order and opinion of the United States Court of Appeals for the Second Circuit.

The issue to be determined herein at a hearing is that of the defendant's competency at the time he entered pleas of guilty to rape in the first degree and robbery in the first degree on September 13, 1963.

Further, if the defendant was incompetent at the time of plea, the question then presents itself as to whether the defendant satisfactorily ratified his pleas of guilty when he appeared for sentence on June 6, 1969.

JA 67

The order of remand requests an explanation of the circumstances surrounding the finding in 1975 of two psychiatric reports of Dr. Emmanuel Messinger of July 23, 1968 and May 20, 1969. These reports are of great importance in the resolution of the issues. As the United States Court of Appeals said: "we believe that the report dated July 23, 1968 may well be of critical importance to the determination of Suggs competence at the time of his pleas."

For a proper understanding of the facts and issues as to the reports the chronology of events is important.

The defendant was arrested on May 6, 1968, in connection with an incident at City College during the course of which a police officer was allegedly injured. The defendant was held for the action of the grand jury on May 13, 1968. Indictment #2251/68 was returned thereon on May 29, 1968.

Subsequently, the defendant was arrested and indicted on a multiplicity of unrelated charges of rape, sodomy, robbery and larceny contained in indictments # 3063 and # 3063A of 1968.

The defendant was then of an age which made him eligible for possible youthful offender treatment. The practice of the court, of which I take judicial notice, was to conduct a pre-pleading investigation by the probation department in the Youthful Offender Part in order to enable the judge to determine whether he would approve a youth for youthful offender treatment. As part of that process a preliminary psychiatric evaluation was routinely done. (If any matter is disclosed therein requiring further evaluation a CPL § 730 examination is ordered.)

The court papers herein disclose that on July 15, 1968, Elmer W. Reeves, the Chief Probation Officer, sent such a request to the Supreme Court Psychiatric Clinic.

Parenthetically I should note that this request had to

do with the factual situation referred to in indictment # 2251/68, the first in sequence.

Pursuant to this request Dr. Emanuel Messinger, the psychiatrist in charge, made such an examination. He reported in writing to the "Presiding Justice of Youth Part Supreme Court" on July 23, 1963.

Thereafter Judge Tierney disapproved the defendant for youthful offender treatment.

That there was such an examination there can be no doubt. That was the routine practice of the court in such cases; Mr. Reeves dated request therefor is extant; Dr. Messinger's report is genuine and he so testified. Furthermore in the minutes of plea Judge Nunez inquired if there had been such an examination. It was the defendant himself who volunteered an affirmative reply that he had been examined "downstairs." When Judge Nunez inquired of the clerk of the court about a report, the clerk advised that he found no such record in the file. It should be noted, however, that the examination was specifically held in connection with indictment # 2251 while the judge and clerk were obviously talking about the cases in which pleas had just been taken, # 3063 and # 3063A. These pleas, however, also covered # 2251. Judge Nunez then saw fit to have the defendant examined at Bellevue.

Lest too much emphasis be placed on the fact of the examination of Dr. Messinger and the possible reasons therefor, it is important to stress the practice of the court.

Because the facilities at Bellevue Hospital are heavily overburdened, a screening procedure was initiated in this court to have the court psychiatrist preliminarily determine if, in his opinion, a more extensive examination is required. In addition, in other cases, particularly where a youth is involved in a serious crime, such as here, such evaluations are routinely

made. And it was done in this case. That report did not indicate that the defendant was incompetent.

I should also note that psychiatric examinations are often made after a guilty plea and prior to sentence as an aid and guide to the court in the imposition of sentence.

In this connection the Justices of the Appellate Division, First Department, have recently called to the attention of all trial judges the desirability of continuing the practice of having such examinations prior to sentence in certain cases. So it was no novelty that Judge Nunez ordered an examination of this defendant after his guilty pleas.

Was the defendant competent at the time of plea?

Clearly the conviction of a defendant while incompetent violates due process.

He was arrested on May 6, 1968, and arraigned in the Criminal Court. In due course he was held for the action of the grand jury. Indulging in the presumption of regularity, it is safe to assume that no judge of the Criminal Court observed any conduct on the part of the defendant that required any sua sponte action on his part. Nor is there any evidence that counsel for the defendant, his family, or anyone else brought anything to the court's attention bearing on the defendant's mental competency.

After indictment the defendant was arraigned in the Youth Part of the Supreme Court. As heretofore noted, in keeping with the custom of that court, the defendant was preliminarily examined by Dr. Messinger and report made on July 23, 1968.

[It has been conceded that that report was never known to Judge Nunez, who took the plea, nor to Judge Sandifer, who later heard one of the defendant's post-conviction motions. However, as the United States Court of Appeals noted, it is still relevant and probative on the issue of the defendant's competency at the time of plea.]

Dr. Messinger testified here that he then found the defendant to be competent and his report of July 23, 1968, so indicates.

Thereafter the defendant was disapproved for youthful offender treatment by Judge Tierney, and in due course appeared before Judge Nunez. On September 13, 1968, while represented by counsel, the defendant entered the pleas of guilty ~~here~~ in question.

Relevant excerpts from the extensive plea minutes follow.

THE COURT: Excuse me.

Mr. Suggs, I want you to listen carefully to what the district attorney is saying now, please. Can you hear him all right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, go ahead.

(S.M. p. 3)

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THE COURT: All right, that motion is granted. Indictment Number 3523 of 1968 is dismissed on motion of the district attorney.

Now, Mr. Suggs, you say you are seventeen?

THE DEFENDANT: Yes, sir.

THE COURT: When were you born?

THE DEFENDANT: June 27th, 1951.

THE COURT: And where were you born?

THE DEFENDANT: Harlem Hospital.

THE COURT: Here in New York?

THE DEFENDANT: Yes, sir.

THE COURT: You went to school here?

THE DEFENDANT: Yes, sir.

THE COURT: How far did you go?

THE DEFENDANT: Eleventh grade.

THE COURT: What high school did you go to?

THE DEFENDANT: Charles Evans Hughes.

THE COURT: And where were you living when you were arrested?

THE DEFENDANT: 519 West 143rd Street.

THE COURT: With whom?

THE DEFENDANT: My aunt.

THE COURT: Where is your father and mother? Where are they?

THE DEFENDANT: My mother is dead and I don't know where my father is.

THE COURT: Do you have any brothers or sisters?

THE DEFENDANT: I have one sister.

THE COURT: How old is she?

THE DEFENDANT: Twenty-two.

THE COURT: How long have you been in jail now?

THE DEFENDANT: Over three months.

THE COURT: Have members of your family been to see you?

THE DEFENDANT: No, sir.

THE COURT: This aunt of yours, was she your blood aunt or is it you just call her aunt?

THE DEFENDANT: I call her my aunt.

THE COURT: How long have you lived with--what is her name?

THE DEFENDANT: Geraldine Hall.

THE COURT: How long have you lived with her?

THE DEFENDANT: Since '65.

THE COURT: And your sister, where does she live?

THE DEFENDANT: She lives down South.

THE COURT: When did your mother die?

THE DEFENDANT: '62.

THE COURT: You don't know -- when was the last time you saw your father?

THE DEFENDANT: When I was about ten or nine.

THE COURT: Now, is Mr. Tucker from the -- one of the attorneys on the staff of the Legal Aid Society your attorney in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Have you talked over these cases that are pending against you with Mr. Tucker?

THE DEFENDANT: Yes, sir.

THE COURT: Did you hear him tell me that you wish to plead guilty to two very serious crimes, one is rape in the first degree and the other one is robbery in the first degree? Did you hear Mr. Tucker tell me that?

THE DEFENDANT: Yes, sir.

THE COURT: Is that your wish?

THE DEFENDANT: Yes, sir.

THE COURT: Did you hear the district attorney tell me that with reference to the rape case it is the People's claim that on May 24, 1968, at about 8:35 p.m. you had sexual intercourse with a woman whose name was

Doris A. Mohit and you had this relation with her against her will and by use of force? And he said that this is stated in -- it is alleged to have taken place in a building on Hamilton Avenue and 139th Street on that day? Did you do that?

THE DEFENDANT: Yes, sir.

THE COURT: What did you do with this woman?

THE DEFENDANT: I took her up to the top floor.

THE COURT: Had you seen this woman before at all?

THE DEFENDANT: No, sir.

THE COURT: Where did you pick her up or where did you get a hold of her?

THE DEFENDANT: Coming off Amsterdam.

THE COURT: Coming off Amsterdam?

THE DEFENDANT: Yes.

THE COURT: Was it dark on this day?

THE DEFENDANT: Yes, sir.

THE COURT: Of course, you are not married to her?

THE DEFENDANT: No, sir.

THE COURT: You had never seen her before?

THE DEFENDANT: No, sir.

THE COURT: And what did you do? How did you get her to go up there?

THE DEFENDANT: Told her if she didn't go up there I would blow her head off.

THE COURT: Well, do you feel any remorse for having done this? Do you feel sorry you did something like that?

THE DEFENDANT: No, sir.

THE COURT: You don't feel sorry?

THE DEFENDANT: No, sir.

THE COURT: Well, you wouldn't like that to happen to your sister, would you?

THE DEFENDANT: It did.

THE COURT: What?

THE DEFENDANT: It did.

THE COURT: That happened to your sister?

THE DEFENDANT: Yes, sir.

THE COURT: You weren't happy about it, were you?

THE DEFENDANT: No, sir.

THE COURT: So you didn't like it?

THE DEFENDANT: No, I didn't.

THE COURT: You did not like it?

THE DEFENDANT: I did not like it.

THE COURT: This lady that you raped on May 24th didn't have anything to do with the rape on your sister, did she?

THE DEFENDANT: No, sir.

THE COURT: Why did you attack her?

THE DEFENDANT: I just had it in mind.

THE COURT: You just had it in your mind?

THE DEFENDANT: Yes, sir.

THE COURT: About how old a person was this lady?

THE DEFENDANT: About thirty-six.

THE COURT: Did you hear the district attorney say that on April 30th, 1968, at about 7:40 p.m. on 136th Street between Amsterdam and Broadway, here in Manhattan, that you had a knife in your hand and that you stole a purse containing the sum of eight dollars from a lady whose name is Eleanor Evans? Did you hear him say that?

THE DEFENDANT: Yes, sir.

THE COURT: Did you threaten the lady with a knife if she didn't give you the money?

THE DEFENDANT: Yes, sir.

THE COURT: Had you ever seen this lady before in your life?

THE DEFENDANT: No, sir.

THE COURT: How old a lady was she, about?

THE DEFENDANT: About thirty-nine, forty.

THE COURT: About thirty-nine or forty. Why did you steal the money from her?

THE DEFENDANT: I just wanted to steal it.

THE COURT: What?

THE DEFENDANT: I just wanted to steal it.

THE COURT: Were you alone when you did these things?

THE DEFENDANT: Yes, sir.

THE COURT: Were you working or were you still going to school?

THE DEFENDANT: I wasn't going to school. I was working.

THE COURT: What kind of work were you doing?

THE DEFENDANT: Teach people self-defense.

THE COURT: You teach people. Do you do it at some school or just on your own?

THE DEFENDANT: My own school.

THE COURT: Your own school?

THE DEFENDANT: Yes, sir.

THE COURT: What do you teach them? How do you teach them to defend themselves?

THE DEFENDANT: I teach them karate, gun foo.

THE COURT: What do all these things mean?

THE DEFENDANT: That's just self-defense.

THE COURT: That's karate?

THE DEFENDANT: That's karate.

THE COURT: Where did you learn it?

THE DEFENDANT: From my instructor.

THE COURT: When did you stop going to school?

THE DEFENDANT: Stopped going to school in '67.

THE COURT: And were you paid for teaching people self-defense?

THE DEFENDANT: Yes, sir.

THE COURT: But you had no regular job? You didn't work for anybody else?

THE DEFENDANT: No, sir.

THE COURT: Where did you teach these people?

THE DEFENDANT: City College in the gym every Friday, Saturday night.

THE COURT: Now, has anyone made any threats to you which have induced you to enter these pleas of guilty to these two crimes?

THE DEFENDANT: No, sir.

THE COURT: Has your lawyer or the district attorney or anyone else made any promise to you as to what the sentence of the court will be?

THE DEFENDANT: No, sir.

THE COURT: Are you entering these two pleas of guilt voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: And are you entering these pleas of guilt because you did rape this girl on May 24th, 1968, and because you did rob this lady of her pocketbook on April 30th, 1968? Is that why you are entering the pleas?

THE DEFENDANT: Yes, sir.

THE COURT: And for no other reason?

THE DEFENDANT: No other reason.

THE COURT: Have you been examined by doctors since you were arrested?

THE DEFENDANT: Yes, sir.

THE COURT: Where?

THE DEFENDANT: Right downstairs.

THE COURT: Right downstairs here?

THE DEFENDANT: Yes, sir.

THE COURT: Were you examined at Bellevue Hospital?

THE DEFENDANT: No, sir.

THE COURT: Do we have a psychiatric report on file, please, Mr. Yochelson?

THE CLERK: No indication, no.

THE COURT: How did you happen to pick this girl, this lady, to rape her? How did you happen to pick her out?

THE DEFENDANT: I just seen her.

THE COURT: Well, you saw many other women, didn't you?

THE DEFENDANT: Yes, sir.

THE COURT: Why did you pick on her? Any particular reason?

THE DEFENDANT: No particular reason.

THE COURT: You are not sorry at all that you did any of these things, Mr. Suggs?

THE DEFENDANT: Nothing to be sorry about.

THE COURT: What?

THE DEFENDANT: There is nothing to be sorry about.

THE COURT: Nothing to be sorry about? Well, what in your opinion would be something to be sorry about? If you did what? If what happened?

THE DEFENDANT: If I did something and I did it there is nothing to be sorry about after I do it.

THE COURT: No matter what you do?

THE DEFENDANT: No matter what I do.

THE COURT: Well, of course, you knew that you were doing something that was illegal, to say nothing of immoral? You knew that, did you not, when you were doing that?

THE DEFENDANT: Yes, sir, I knew that.

THE COURT: Arraign him on those two pleas. I will take the pleas.

THE CLERK: John Suggs, you are advised that if you have been previously convicted of two or more felonies that fact may be established hereafter, and when you plead guilty under these indictments you may be sentenced as a persistent felony offender. Do you understand that?

THE DEFENDANT: Yes, sir.

THE CLERK: Do you now withdraw your plea of not guilty heretofore interposed by you and do you now plead guilty to the crime of rape in the first degree under Indictment 3063 of 1968, and do you further plead guilty to the crime of robbery in the first degree under Indictment 3063A of 1968, those pleas to cover also indictment 2251 of 1968? Are those your pleas?

THE DEFENDANT: Yes, sir

[Whereupon, the defendant was duly sworn and his pedigree was taken.]

THE COURT: Well, now, Mr. Suggs, you know that you are going to be punished for these crimes, do you not?

THE DEFENDANT: Yes, sir.

THE COURT: Well, don't you think it might help you if you show that you are sorry, you show some compassion for your victims?

THE DEFENDANT: I tried that once.

THE COURT: What?

THE DEFENDANT: I tried that once.

THE COURT: You tried that once? When was that?

THE DEFENDANT: When I was small.

THE COURT: What happened when you were small?

THE DEFENDANT: I lost a finger because I tried.

THE COURT: You lost a finger, you say?

THE DEFENDANT: Part of it.

THE COURT: What happened then?

THE DEFENDANT: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

THE COURT: Who tried to cut you, your mother or your sister?

THE DEFENDANT: My mother.

THE COURT: Did you get in difficulties in school or no?

THE DEFENDANT: I didn't get in no difficulties in school.

THE COURT: You didn't have fights with other children or things like that?

THE DEFENDANT: No.

THE COURT: Set it down for investigation and sentence October 31st. I want a complete psychiatric examination and report on this boy. And for that purpose I wish to commit him on my motion to Bellevue Hospital for examination and report.

Mr. Tucker, do you feel that in view of what this boy has stated here today that an examination is in order?

MR. TUCKER: I think it would be in order, Your Honor, to help Your Honor and the court determine the sentence of this defendant. I would recommend that, Judge.

THE COURT: All right, committed to Bellevue Hospital for examination and report, psychiatric examination and investigation, and sentence 10-31, October 31, 1968.

We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be -- whom are you made at?

THE DEFENDANT: No one.

THE COURT: All right, see you on the 31st. Try to cooperate with the doctors. See if they can help you.

After plea on September 13, 1968, Judge Nunez ordered a psychiatric examination and adjourned sentence. The psychiatric report of Drs. Kadar and Lubin of October 9, 1968 found the defendant to be then incompetent.

Whether or not the defendant was incompetent on October 21, the question here is, was he incompetent on September 13.

The District Court, in its opinion herein in 390 F. Supp. 383 at p. 389, said, "It is manifest that where a defendant has been remanded for a competency examination immediately after pleading guilty, and is subsequently found incompetent to stand trial, such a plea must be considered null and void"

I respectfully submit that that is neither true as a matter of fact nor law. Indeed the psychiatrists, Drs. Kadar and Lubin, called by the defense here, concede that the defendant could very well have been competent on September 13 when he entered his plea. And Dr. Messinger who found him to be competent on July 23, 1968 conceded that the defendant could have been incompetent on 9/13/68.

I certainly agree that proof of incompetency shortly after the entry of a plea is both relevant and highly important evidence on the issue of competency at the time of plea. But it is not determinative. No more so than the Messinger testimony of competency before plea.

The relevant evidence on the issue of the defendant's competency at the time of plea consists of the testimony and reports of Drs. Messinger, Kadar and Lubin, the minutes of plea and the testimony of those who saw and or talked to him at that time.

Turning to the minutes of plea - it seems abundantly clear that the defendant knew where he was and what he was doing. His answers were clear, relevant and responsive. The minutes

of plea cover twenty-one pages. The defendant verbalized more than his counsel or the district attorney. He was represented by an extremely able and experienced attorney. His memory was intact. He admitted consultation with counsel. The facts of each of the two cases to which he pleaded guilty were explained to him twice - once by the assistant district attorney and once by the court. He admitted his guilt as to each and further explained additional aspects to the court. He even prognosticated the age of a female victim as "about thirty-six," and the other as "about thirty-nine, forty."

He was asked if any promises were made to him and if his plea was voluntary. He said no promises were made and the plea was voluntary and that he was pleading guilty only because he in fact was guilty.

The United States Court of Appeals found that "Justice Nunez conducted an extensive voir dire examination of Suggs Suggs' responses indicated that he understood the charges, that there was a factual basis for his pleas and that he was pleading voluntarily. He admitted all of the alleged facts and even volunteered information."

Why would a defendant, represented by an able and experienced lawyer, enter a plea of guilty to two class B felonies, each carrying a possible sentence of up to twenty-five years? Was it due to the mental incompetence of the defendant and/or the legal incompetence of counsel, or was it due to an abundance of prudence on their part?

The defendant faced multiple count indictments embracing many unrelated crimes of rape, sodomy, robbery, weapons, assault etc. Would not competent judgment dictate the acceptance of the best offer in order to avoid convictions on multiple counts with the added impact of the court having heard live testimony of victims?

In this connection it is also interesting to note that through years of litigation the defendant never raised the issue of his competency at time of plea, until he brought this writ in the federal court.

Did Judge Nunez order a psychiatric examination after the plea but prior to sentence because he believed the defendant then to be incompetent?

As previously indicated this was and is a regular practice of the court. It frequently is an aid in sentence and particularly so when the defendant is a youth, as was this defendant.

Dr. Lubin, called by the defense, testified in part as follows:

Q Did you feel that the defendant, the patient, understood the nature of the legal process?

A. Yes.

Q Do you feel that he was able to recognize the consequences or possible consequences that could flow from the legal process to him?

A. I think that he could in a limited sense. I think that he really wasn't fully appreciative of the dangers that might be involved in his adamant stance on one position or another, like his innocence, for example.

In other words, I don't think he fully appreciated it, no. I think he could have known what it means to go to a jail or to a hospital, he had been in both places, but I don't think he appreciated it too well at that time.

THE COURT: I don't quite follow what you mean by that doctor. You mean he didn't appreciate that it might be to his advantage to plead guilty rather than stand trial?

THE WITNESS: Yes, I don't think his judgment was good.

THE COURT: When you say "judgment," you are talking about the exercise of prudence, right?

THE WITNESS: Well, just in terms of what's good for a person at a particular time.

Like, in other words, some people have better judgments than other people, but some one individual may have better judgment at one time than another time.

I think at this particular point in time his

judgment was not as good as it could potentially be, perhaps as good as it is today or perhaps as it was in September of 1968, early September 1968 or August 1968, or some such thing.

THE COURT: But are you talking about judgment in terms of the exercise of prudence and wisdom or something else?

THE WITNESS: Well, Judge, I would say being prudent, wisdom, yes, that would satisfy me, yes.

THE COURT: Don't you find it a common phenomena from your experience at Bellevue that-- and life generally that frequently a defendant will go to trial, stand trial, when it's against his own best interest to do so?

THE WITNESS: Yes.

THE COURT: And not be suffering from any mental deficiency?

THE WITNESS: Yes. Mental disease.

THE COURT: Mental disease.

THE WITNESS: Yes, it's true that they use bad judgment. It happens a lot.

BY MR. SEEWALD:

Q Was it -- did you find that the defendant was able when he did not deny the commission of these crimes -- well, first, was he able to describe what it was that he was charged with at any point?

A. He was able to describe it, but reluctantly, and then decided to deny. It depends on who he spoke to when, but it was our impression that he knew that he was being tried for rape or robbery or both.

He was maybe electing not to remember that he had done anything, but I believe that he generally

held that he knew what the crime that he was being tried was all about.

Q Would you agree that it's human nature often to deny certain unpleasant facts to various people when confronted with those allegations?

A. Very common.

Q And is it also human nature sometimes to just try to blot it out of your mind?

A. Yes, very common.

.

Q If the defendant truly was not purposely withholding the information, you know, in a devious plan to improve his position, how far back -- if you can say -- how far back could his incompetency go?

Could it be almost any period of time, either negligible or long?

A. Depending upon the kind of symptoms and signs we see of disorder in thinking it could be one hour, one day, a week. It could be six months.

Q And do you have any indication based on signs that you, you know, your recollection has been refreshed about?

A. Yes, I would say the particular signs that he showed and symptoms that we had.

If I can quote from my report:

"There were not specific paranoid delusions elicited although he is quite guarded and suspicious." and so on.

He didn't have a full-blown psychosis. We could have assumed that it might have been a shorter period

rather than a longer period that he had the symptoms that he had in order for us to think of him as incompetent.

So it might have been that he was competent at a very brief period before the time that we saw him.

THE COURT: That specifically raises the question as to his competency when he entered the plea of guilty on September 13, 1963.

THE WITNESS: Yes.

THE COURT: What would your answer be as to that?

THE WITNESS: I don't know.

THE COURT: You don't know?

THE WITNESS: I can only say that he might well have been competent in September.

.

BY MR. SEEWALD:

Q Now I call to your attention the statement that in your report, and I quote, "He claims having seen many different Legal Aid attorneys but states that his most recent attorney told him his best chance to minimize his sentence was to admit guilt to which he acquiesced."

How does that square with the analysis that we have just put forward?

A. You are talking about the man when he was considered competent, the man at trial, prior to trial considering a plea? It squares. There is no problem there.

He was evidently able to come to a conclusion

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at that particular point, and I think he was in a plea situation with Judge Nunez before he was transferred to the prison ward.

There was no problem. He was cooperating with his attorney.

Dr. Messinger, called by the People, testified in part as follows:

Q Doctor, at the conclusion of all of the tests and examinations, did you reach a conclusion as to the competence of the defendant John Suggs?

A. Yes.

Q And what was that conclusion?

A. My conclusion was that he was competent to stand trial and cooperate with counsel and that he had sufficient understanding to participate in his defense.

Q Did he understand what proceedings were being brought against him in court?

A. In my opinion, he did.

Q Did he recognize and understand the possible consequences of the courtroom proceedings?

A. In my opinion, he did.

Q Was he able at that time to assist his defense attorney, whoever that might be, in the defense of his case?

A. In my opinion, he was able to.

Q Were you able to communicate with the defendant?

A. I was able to communicate with him.

Q Now, doctor, given the fact that, I believe, you know, that he was found to have been not competent, I believe, October 21st, 1968. Given that fact, does that necessarily mean that he must have been incompetent on September 13th, 1968?

A. By no means.

THE COURT: I didn't hear that.

THE WITNESS: By no means.

BY MR. SEEWALD:

Q Could you explain that?

A. Well, people who are found competent on one day can become psychotic or incompetent at another time at a later date and they can recover.

.

Q Now, when you examined the defendant again on May 20th of 1969, referring to your report, did you find any significant change in the defendant or to the contrary?

A. No, I did not find any significant change.

Q What was his -- his diagnosis at that time? Was it -- well, you have in your report--

A. Yes, I kept the same diagnosis.

Q You indicate in the report of May 20th that among other things that the defendant is cool and calculating in his mode of responding?

A. Yes.

Q Did you find that to be the case in the prior observation as well or not?

A. I believe I did.

Q And did that indicate anything particular to you, doctor?

A. It indicated to me that he knew what he was doing. He was aware of what he was doing, and he was trying to find what he thought was the best way to get out of his unpleasant situation.

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--incidentally, on the other question tied in with the fact that this defendant subsequent to your first examination had pleaded guilty, does the fact that he denied--given the fact that he denied having any remorse for his alleged crimes, does that have any bearing now on the issue of competency?

A. I don't think so.

Q Why is that?

A. Because I feel in order for a person to have remorse they have to have feelings of guilt and social responsibility which our diagnosis of that type of behavior disorder would say he is not likely to have.

THE COURT: Before I lose this, doctor, so then going back to the question I asked earlier, so the fact that Mr. Suggs was examined by you, are you saying was not as a result of any conduct or manifestation of incompetency that he exhibited--

THE WITNESS: No.

THE COURT: --either in the courtroom or to counsel, or to the correction authorities that you are aware of--

THE WITNESS: Yes.

THE COURT: --but rather to the routine practice of accepting defendants in the youth part?

THE WITNESS: Yes.

On the issue of competency at the time of plea, the defense rests heavily on the testimony of the psychiatrists, Drs. Kadar and Lubin.

Dr. Messinger had examined the defendant in July 1968 and found him "without psychosis and of average intelligence." The plea was entered on September 13, 1968. Dr. Lubin examined the defendant on September 25, 1968, and Dr. Kadar conducted an examination on October 21, 1968. By a report dated October 21, 1968, Drs. Kadar and Lubin found the defendant to be incompetent.

At no time, from the date of arrest in May 1968 through the plea of guilty on September 13, 1968, did the defendant by word or act raise any question of competency. Counsel presented no such issue.

Dr. Messinger, a man of long experience with highly impressive credentials, gave cogent and compelling testimony as to the defendant's competency in July 1968. His testimony seemed, at least to this court, to be highly credible and reliable. The testimony of Drs. Kadar and Lubin was not as impressive.

In any event, all three psychiatrists agree that whether the defendant was incompetent or competent in October 1968, he could very well have been competent on September 13, 1968.

It should be noted, too, that, on the defendant's appeal from his conviction, he did not raise the issue of his competency at time of plea but rather that the sentencing judge should have ordered a competency hearing sua sponte. And this despite the fact that the defendant had just been returned from Mattewan State Hospital as competent and another preliminary examination by Dr. Messinger had confirmed this finding.

Bizarre behavior at time of plea is referred to by the District Court. This apparently relates to the defendant's assertion, in response to a question by Judge Nunez, that he was not sorry for what he had done.

Far from being bizarre, it is no novelty in this court for a defendant to deny remorse or to manifest complete indifference for a criminal act.

Additionally, the minutes of plea reflect no impairment of memory. He answered questions covering many aspects of his life from birth to date of arrest and even recalled Dr. Messinger's examination some six weeks prior to plea. He recalled the crimes to which he pleaded and volunteered information in connection therewith. He demonstrated a capacity to exercise judgment. He was able to assess the ages of two of his victims. His answers were responsive, relevant, and illuminating.

Able counsel found no reason, either prior to or during plea, to lead him to believe that the defendant was incompetent. However counsel did agree with Judge Nunez that an examination would be desirable as an aid in imposing sentence.

Certainly an able and experienced jurist such as Judge Nunez did not then believe the defendant to be incompetent else he would not have accepted the plea. Indeed, the judge had no reason to believe the defendant to be incompetent.

Dr. Messinger's report of July 1968 is also supported and confirmed by the testimony of assistant district attorney Collins and Mr. Tucker.

Under all of the facts and circumstances I find that the defendant was competent on September 13, 1968, when he entered pleas of guilty.

Leaving the issue of mental competency aside, the question remains, was it a knowing and voluntary plea, conforming to necessary legal standards?

The District Court, in finding that there is no evidence of the entry of a knowing and voluntary plea, cites *Boykin v. Alabama*, 395 U.S. 238.

In *Boykin*, the court pointed out that other than the entry of the plea itself the record was silent. The court said, the "judge asked no questions of petitioner concerning his plea and petitioner did not address the court."

"It was error . . . for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

In the case sub judice there are fourteen pages of colloquy between the judge and the defendant. It amply demonstrates an intelligent and voluntary plea.

In *People v. Nixon*, 21 N Y 2d 338, our Court of Appeals considered in depth many issues arising on the acceptance of pleas of guilty in varying circumstances.

It held that there is no obligation in every case to inquire of a defendant concerning his guilt. There is no uniform mandatory catechism to be followed in accepting a plea. It is left to the reasonable discretion of the court. Competency of counsel is an important factor; freshness or staleness of the complaint is also a factor to be weighed. Is the plea understandable in light of the reasonable alternatives to be contemplated?

In *Woodruff v. Mancusi*, 41 A D 2d 12, the *Boykin* issue as to plea standards was raised. The plea pattern was much the same as the case herein but not nearly as extensive. The court held that *Boykin* was not applicable and clearly distinguishable. To a greater extent is that true here.

Indeed the United States Court of Appeals, in commenting on this case, referred to the extensive plea examination and

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indicated no possible violation of the Boykin rule.

The District Court further pointed out that the plea might be defective for failure explicitly to waive the three constitutional rights of jury trial, confrontation, and self-incrimination. The Boykin court merely mentioned that these were three of the rights that were waived when a plea of guilty was entered but made no requirement that they be explicitly waived. Indeed, the reversal was predicated on a completely silent record. People v. Nixon, 21 N Y 2d 338 and Woodruff, 41 A D 2d 12 make no such requirement.

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If it be assumed that the defendant was incompetent when he entered his guilty pleas on September 13, 1968, the further question arises as to whether on his date of sentence, in 1969, he then ratified his earlier guilty pleas.

The defendant was sentenced by Mr. Justice Mitchell Schweitzer rather than Justice Nunez, for the reason that in the interim Justice Nunez had been elevated to the Appellate Division, First Department.

The minutes of sentence, in part, reveal the following:

THE COURT CLERK: John Suggs. Three cases. 2251 of 1968, 3063 of 68 and 3063A of 68. Is your name John Suggs?

THE DEFENDANT: Yes, sir.

THE COURT CLERK: Is Mr. Jerome Tobin who is present in court your lawyer?

THE DEFENDANT: Yes.

THE COURT CLERK: Now on indictment 3063 of 1968, you are arraigned before this Court for sentence on your plea of guilty to the crime of rape in the first degree. On indictment No. 3063A of 1968, you are arraigned before this Court for sentence on your plea of guilty to the crime of robbery in the first degree. On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law? You must answer.

THE DEFENDANT: Yes, I do.

THE COURT CLERK: He says he has reasons why judgment should not be pronounced, your Honor. All right, speak.

THE DEFENDANT: Judge, at that time I wasn't capable of understanding the case.

THE COURT: I want the record to be crystal clear that this Court previously had adjourned these sentences until a later date in this month in order to afford his newly appointed assigned appellate division counsel to formalize any application which his client desired to make to withdraw his plea of guilty, is that correct, Mr. Tobin?

MR. TOBIN: Yes

THE COURT: Is it also correct that two days ago, on Wednesday of this week you came to me and indicated that your client desired to withdraw such application?

MR. TOBIN: Correct

THE COURT: He wanted to abandon such plan and to accept the sentence in this case, is that correct?

MR. TOBIN: Yes.

THE COURT: Did I further indicate to you that in light of that I would advance the sentence date?

MR. TOBIN: Right, your Honor

THE COURT: Do you want a second call to talk to your client?

MR. TOBIN: No, your Honor. He is not changing his plea. He simply wants to explain what happened.

THE COURT: No. The question which the clerk posed of him is this. Does he have any legal cause to show why judgment of this court should not now be pronounced upon him.

THE DEFENDANT: No.

THE COURT: Now Mr. Suggs, you understand what I did say with respect to the applications which your lawyer had previously attempted to make on your behalf to withdraw your pleas of guilty, did you understand what I said?

THE DEFENDANT: Yes, sir.

THE COURT: Did you understand I gave him this opportunity to make the application but that he came to me on Wednesday and he requested that I advance your sentence date because you no longer planned to withdraw your pleas of guilty, is that correct?

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THE DEFENDANT: Yes, that's correct.

THE COURT: Now, so we will have no misunderstanding either at this time or in the future, do you wish to be sentenced today or do you want an adjournment of your sentence so you can confer again with your lawyer whether or not you want to withdraw your pleas of guilty?

THE DEFENDANT: I wish to be sentenced today.

THE COURT: Then may I assume therefore, that after conferring with your lawyer you no longer plan to withdraw your pleas of guilty, is that correct?

THE DEFENDANT: That is correct.

THE COURT: All right, I am going to ask the clerk to pose the allocution [sic] again.

THE COURT CLERK: On either or both of these indictments have you any legal or other cause to show why judgment should not be pronounced against you according to law? You must answer.

THE DEFENDANT: No.

It should be noted that the defendant, though only seventeen at the time of plea, had prior experience with incarceration as a juvenile.

The District Court says that at time of sentence, though defendant refused an opportunity to withdraw his plea, he was not asked again to admit the commission of the criminal acts. To this date, in no court proceeding has the defendant claimed to be innocent.

When he declined to withdraw his plea, and when sane and when represented by counsel, is it not reasonable to assume that he knew that to which he had pleaded guilty? He was not rushed through the criminal process, as in Boykin.

At time of sentence he still opted for the imposition of sentence on the plea rather than face the possibility of consecutive sentences on multiple B felony counts.

It is true that no magical formula of ratification was adhered to at the time of sentence. I submit that none is needed. ~~One~~ process is satisfied when reason, logic, and common sense point to the conclusion that justice, according to law, was done.

I hold that the defendant was competent at the time of plea, and ratified that plea at time of sentence.

The defendant's motion is in all respects denied.

This constitutes the opinion, findings and order of the court.

12/3/75.

A. J. J. J.

ALCYNUS J. VELIA

JUSTICE OF THE PEACE
STATE OF NEW YORK

(OPINION OF THE DISTRICT COURT, NOVEMBER 16, 1976)

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S.D.N.Y.

U.S. DISTRICT COURT

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W.L.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA ex rel.
JOHN SUGGS,

Petitioner,

-against-

J. EDWIN LA VALLEE, Superintendent,
Clinton State Correctional Facility,
Dannemora, New York,

Respondent.
-----X

OPINION AND ORDER

72 Civ. 4336

45370

APPEARANCES:

JUDSON A. PARSONS, JR., ESQ.
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District Attorney
Attorney for Respondent
By: Peter L. Zimroth, Esq.
Henry J. Steinglass, Esq.
Assistant District Attorneys
Of Counsel

KEVIN THOMAS DUFFY, D.J.

This case is once more before this Court, after
having been remanded to State court for an evidentiary
hearing. The remand was ordered in light of the sudden

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appearance of two psychiatric reports which were produced by the State respondents only on appeal from my order vacating petitioner's guilty plea on the ground of incompetence and granting a writ of habeas corpus unless petitioner reaffirmed his plea in State court. The facts surrounding his incarceration are detailed in my opinion of February 25, 1975, 390 F.Supp. 383 (S.D.N.Y. 1975) and in the opinion of the Court of Appeals, 523 F.2d 539 (2d Cir. 1975).

On September 13, 1968, petitioner Suggs pleaded guilty to one count of rape and one count of robbery before Justice Nunez of the State Supreme Court, New York County, in satisfaction of two indictments filed July 30, 1968, charging petitioner with various counts of rape, sodomy, robbery and possession of a weapon. As a result of answers given by Suggs to extensive questioning by the court, he was ordered to Bellevue Psychiatric Hospital for a psychiatric examination and report. His plea, however, was accepted and a date was set for sentencing.

A psychiatric report was completed and sent to the court by Drs. Martin I. Lubin and Laszlo Kedar on October 21, 1968, indicating that Suggs was a paranoid-type schizophrenic, who was "incapable of understanding the charge, proceedings or making his defense." Pursuant to Section 662

of the then-Code of Criminal Procedure, now contained in Article 730 of the Criminal Procedure Law, Suggs was committed to the custody of the Commissioner of Mental Hygiene on November 6, 1968, by order of Justice Gold after a hearing, and was committed to Matteawan State Hospital for the Criminally Insane on November 15, 1968. On April 9, 1969, Suggs was certified as competent and returned to the court for sentencing, which was imposed on June 6, 1969.

My decision granting habeas corpus relief was based in part on the Lubin-Keder report of October 21, 1968, which stated that petitioner was psychotic at that time and formed the basis of an inference that he was incompetent at the time his plea was taken. This report was the only available psychiatric report in the record before me. On appeal, however, the State requested leave to expand the record (instead of requesting remand to me) to include two psychiatric reports dated July 23, 1968 and May 20, 1969 prepared by Dr. Emanuel Messinger, which stated that Suggs was not psychotic. In so finding, they flatly contradicted the reports upon which petitioner's hospitalization, and my conclusions of February 25, 1975, were primarily based. In light of these newly discovered reports, the Court of Appeals directed that an evidentiary hearing be held, leaving the forum to my discretion. 523 F.2d 539 (2d Cir. 1975). Since necessary witnesses included Justices of the

State Supreme Court, I requested from the State court findings concerning knowledge of the existence of the Messinger reports as bearing on the validity of Sugg's plea. 400 F.Supp. 1366 (S.D.N.Y. 1975). The State court hearing, however, did not focus on the lack of awareness of the reports; instead, based on the evidence adduced, Judge Melia concluded that petitioner was competent at the time his plea was taken and that petitioner had ratified the plea at the time of sentencing.

Petitioner now asserts that he is entitled to a writ of habeas corpus notwithstanding this State court determination, contending that the guilty plea should be set aside since he was incompetent at the time the plea was entered, and, in any event, the failure to supply his defense counsel with the Messinger report of July 23, 1968 violated his right to due process. Alternatively, he seeks a full evidentiary hearing in this Court. The State respondent has cross-moved to dismiss the proceedings for failure to exhaust State remedies.

The State's contention that petitioner's present relief lies in a direct appeal of Judge Melia's finding in the State appellate system is meaningless at this stage of the proceedings. The issue of petitioner's competency at the time of plea has already been argued before a State

appellate court in a coram nobis petition which was denied in 1973.*/ The Messinger report of July 23, 1968, which is part and parcel of that issue, was produced some seven years after the plea was taken, after this Court had ruled once on petitioner's case and an appeal was pending from that ruling, and after petitioner had been forced to return for a further series of State proceedings, including the above mentioned appeal. To seek to require a further appeal with its consequent delay is an intolerable request which flies in the face of the "important policy of not exhausting state prisoners who seek to assert their federal constitutional rights." United States ex rel. Suggs v. La Vallee, 523 F.2d 539, 543 (2d Cir. 1975). Indeed, petitioner, at this stage has done everything possible and appropriate.

In any event, it is clear from the record that I referred the hearing to State court not out of exhaustion considerations, but rather out of respect for the convenience of the Justices in the State system, whose testimony was essential. 400 F. Supp. 1366, 1367 (S.D.N.Y. 1975). It was well within my discretion to ignore this accommodation and

*/ Although the Court of Appeals noted that it was unclear whether the issue of petitioner's competency at the time of his guilty plea had ever been presented to the State courts, 523 F.2d 539, 543 (2d Cir. 1975), it is clear that the question was raised in petitioner's second coram nobis petition which was omitted from the appellate record. (Ex. G to Affidavit in Support of Petitioner's Motion).

hold the hearing myself. The fact that I might disagree with the result obtained at the hearing does not reduce my respect for the State judiciary. The making of this motion, unfortunately, causes me to comment on the possible absence of what I feel to be appropriate respect for both this Court and the State judiciary on the part of the State respondent or his counsel.

Petitioner's motion to summarily set aside his guilty plea is also denied. The question of petitioner's competence at the time of his plea on the record as it now stands presents a question of fact which is incapable of summary resolution. The Messinger report of July 23, 1968 indicated that Suggs was free of psychosis; it did not deal with the issue of his competence. Notwithstanding this fact, petitioner argues that it raised substantial questions regarding his mental ability and stability, and had it been available to his defense counsel, a complete pre-plea examination establishing his incompetence would have been requested. Petitioner urges that Brady v. Maryland, 373 U.S. 83 (1963) applies to this situation, and that the suppression of evidence favorable to Suggs was a violation of due process. This contention is somewhat tenuous. It cannot be said that the Messinger report was so favorable to Sugg's position as to be tantamount to an exculpatory

statement; indeed, the Court of Appeals, in vacating my order and remanding the case for a hearing in light of the production of this report, implied that, at least in its view, the report represented some indicia of competence. See 523 F.2d 539, 542 (2d Cir. 1975). Additionally, despite the inexcusable failure of the State to produce this report at an earlier time, it is questionable whether the report was suppressed within the meaning of Brady.

Petitioner is, however, entitled to a federal hearing on the issues presented. I remanded the case to State court for the mere taking of testimony to determine whether those involved with the case had knowledge of the Messinger reports. Judge Melia's finding of Suggs' competency at the time the plea was taken and subsequent ratification of the plea at the time of sentencing went far beyond this narrow matter referred for resolution. Indeed, the issue concerning ratification of the plea at sentencing had previously been disposed of by my opinion of February 25, 1975, in which I determined that no valid ratification had occurred and that the inquiry into the voluntariness of the plea was insufficient under the standards of Boykin v. Alabama, 395 U.S. 238 (1969).

Moreover, certain of the assumptions upon which Judge Melia's determination was based contradict the record. Although Judge Melia suggests that the examination

ordered by Justice Nunez following acceptance of the plea was for sentencing purposes only, the stipulation relating to Justice Nunez's testimony states in no uncertain terms that such examination was not just for the purpose of sentencing, but "for all purposes, including a determination of whether the defendant was competent to be tried." Judge Melia also asserts that the "bizarre behavior at the time of plea" to which my February 25 opinion referred "apparently relates to defendant's assertion that he was not sorry for what he had done." Yet even a cursory glance at the plea minutes indicates that it was the reason given by Suggs as to why he was not sorry, and not the lack of remorse itself, which was unusual. This is evidenced by the following excerpt from those minutes:

The Court: Well, don't you think it might help you if you show that you are sorry, you show compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small.

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you your mother or your sister?

The Defendant: My mother. (Plea minutes, pp. 19-20).

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be--whom are you mad at?

The Defendant: No one. (Id. at 20, 21).

Even if the hearing before Judge Melia were viewed as a full blown State proceeding, the factual findings of which are entitled to a presumption of correction on a federal habeas corpus petition, LaVallee v. Delle Rose, 410 U.S. 690 (1973), petitioner would still have the right to a federal evidentiary hearing since the merits of the factual dispute were not fully resolved in the State court hearing. 28 U.S.C. § 2254(d)(1). When I requested the hearing to be held in State court, I named certain witnesses whose testimony appeared necessary; these suggestions were not exhaustive. Indeed, it is clear now that it was imperative to take the testimony of Justice Gold, who concluded that Suggs was incompetent after consulting the Lubin-Kedar report and holding

a hearing, and who entered an order which caused Suggs to be transferred from Bellevue to Matteawan to be hospitalized: His testimony was not taken. This glaring omission renders the State court record incomplete for the issue presented by the later appearing Messinger report could not have been adequately resolved without some indication of Justice Gold's knowledge or lack of knowledge of the existence of the report at the time of his findings.

In determining that a hearing on the competency issue must be held, I am not unmindful of the dim view taken by the Supreme Court of nunc pro tunc determinations of competency in situations where ambiguities exist regarding the legal significance of psychiatric evidence in the absence of a contemporaneous competency determination. See, e.g., Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960); Sandridge v. United States, 356 U.S. 259 (1958). However, because the Court of Appeals has called upon me to cause this issue to be retroactively litigated, I am bound by that Court's determination of the procedural posture that this case must assume.

Both petitioner's motion for summary judgment and respondent's motion to dismiss are denied. The matter will be set down for an evidentiary hearing.

JA 110 11.

SO ORDERED.

Lin Thomas

U. S. D. J.

Dated: New York, New York
November 16, 1976.

JA 111

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.
JOHN SUGGS,

Petitioner,

OPINION AND ORDER

-against-

72 Civ. 4336

J. EDWIN LaVALLEE, Superintendent,
Clinton State Correctional Facility,
Dannemora, New York,

Respondent.

APPEARANCES:

JUDSON A. PARSONS, JR., ESQ.
Attorney for Petitioner
By: Christopher Kende, Esq.
Of Counsel

HONORABLE ROBERT M. MORGENTHAU
District Attorney, New York County
Attorney for Respondent
By: Henry Steinglass, Esq.
Robert Seewald, Esq.
Assistant District Attorneys
Of Counsel

KEVIN THOMAS DUFFY, D.J.

After a long and somewhat tortured history of judicial consideration, this habeas corpus proceeding has culminated in an evidentiary hearing on the issue of petitioner Suggs' competence at the time he entered guilty

pleas to one count each of rape and robbery in state court. Both the circumstances of Suggs' incarceration and the procedural route taken by his petition are detailed in my opinions of February 25, 1975, 390 F.Supp. 383 (S.D.N.Y. 1975), September 3, 1975, 400 F.Supp. 1366 (S.D.N.Y. 1975), and November 16, 1976, 422 F.Supp. 1042 (S.D.N.Y. 1976), and in the opinion of the Court of Appeals of August 7, 1975, 523 F.2d 539 (2d Cir. 1975).

Simply stated, Suggs was convicted and sentenced to concurrent five to fifteen year terms of imprisonment on the basis of guilty pleas entered before Justice Nunez of the State Supreme Court, New York County, on September 13, 1968. Immediately following the acceptance of the pleas, as a result of post-plea statements made by Suggs, Justice Nunez ordered Suggs to Bellevue Psychiatric Hospital for a psychiatric examination and report. This report, dated October 21, 1968, and prepared by Drs. Martin I. Lubin and Laszlo Kadar, diagnosed Suggs as a paranoid type schizophrenic, "in such a state of insanity as to be incapable of understanding the charge, proceedings or making his defense."

On November 6, 1968, on the basis of this report, and with the consent of the parties, Justice Gold committed Suggs to Matteawan State Hospital for the Criminally Insane,

where petitioner remained until he was declared competent on April 4, 1969. On June 6, 1969, sentence was imposed by Justice Schweitzer based solely on the petitioner's guilty plea of September 13, 1968.

After Suggs attempted various unsuccessful challenges to his conviction through state appellate and post-conviction proceedings, I granted federal habeas corpus relief, directing that the guilty pleas be reopened or reaffirmed before sentence could be imposed. On the basis of the record before me, I determined that Suggs was incompetent at the time of his pleas, which condition rendered the pleas void; that any attempted ratification of the pleas at sentencing failed, and that no effective waiver of rights occurred at sentencing as a result of an inadequate inquiry into the voluntariness of the pleas under Boykin v. Alabama, 395 U.S. 238 (1969), decided four days before Suggs was sentenced.

After the State respondent filed its notice of appeal from my order, two psychiatric reports dated July 23, 1968 and May 20, 1969 were discovered in the dead records file of the State Supreme Court's Psychiatric Clinic. These reports, prepared by Dr. Emanuel Messinger, stated that Suggs was not psychotic, thereby flatly contradicting the only psychiatric report theretofore in the record. In

light of these eleventh hour reports, the Court of Appeals remanded the case for an evidentiary hearing,^{1/} leaving the forum to my discretion. For the convenience of the Justices of the State Supreme Court, whose testimony was essential, I requested that the hearing be held in state court. However, for reasons detailed in my opinion of November 16, 1976, 422 F.Supp. 1042, the determination of Justice Melia, before whom testimony was taken, was set aside and a federal evidentiary hearing was ordered and subsequently held before me, on the issue of Suggs' competence at the time his guilty pleas were taken. This opinion constitutes my findings of fact and conclusions of law on the issue pursuant to Rule 52(a), F.R.Civ.P.

My consideration of the weight to be accorded the Messinger reports in determining Suggs' competency on September 13, 1968, the day of his guilty pleas, begins with the circumstances surrounding their preparation. On July 15, 1968, after petitioner had been arrested and was being held in custody, the Probation Department in the Youthful Offender Part of the State Supreme Court, New York County, requested that Court's Psychiatric Clinic to conduct a preliminary examination of Suggs. Apparently, this was done as part of a routine pre-pleading investigation of defendants such as Suggs, then 17 years old, to determine whether youthful offender treatment would be appropriate.^{2/}

It was pursuant to this request that Dr. Emanuel Messinger, the psychiatrist-in-charge, examined petitioner and prepared the written report of July 23, 1968, stating that petitioner was "without psychosis" and describing Suggs' personality classification "as that of the Pathologic Personality Group, Emotionally Unstable Type, with depressive and paranoid trends." The report also quoted from the following notation, among others, of Dr. Suessmilch, the psychologist who tested Suggs:

Although this defendant refused to cooperate on most of the Rorschach, such projective material as we have does not suggest a true thinking disorder, nor a psychosis. He impresses us as wilful, defensive, hostile, negativistic, paranoid and antisocial. We would classify him as a narcissistic behavior disorder of extreme degree. A poor prognosis is quite likely.

The usual procedure at that time was for copies of such psychiatric reports to be sent to the Probation Department and to the court. However, the plea minutes indicate that when Justice Nunez inquired whether Suggs had undergone a psychiatric examination, the court clerk replied that there was no record indicating so.^{3/}

It is clear that, despite Suggs' assertion at the plea hearing that he was examined "right downstairs," Justice Nunez was unaware of the Messinger report.^{4/} Donald Tucker, petitioner's assigned counsel, was likewise uninformed of the examination and report. Even though the

testimony indicated that copies of such reports were not usually sent to defense counsel, John Collins, the Assistant District Attorney handling Suggs' pleas, testified before Justice Melia that consent of the defendant and counsel would have to be obtained before such an examination could proceed. Nothing in the record indicates that this procedure was followed.

Mr. Tucker further testified that had he been aware of the fact that there had been such an examination, notwithstanding Dr. Messinger's determination, he would have asked for a further examination of petitioner, even if Justice Nunez had not done so. Mr. Tucker had no personal recollection of petitioner, but he testified before me that if he had interviewed a defendant and felt that he was "not in some way psychiatrically competent," he would put a notation in his file and request a psychiatric examination. The file is devoid of any such indication;^{5/} to the contrary, the file contained a statement signed by petitioner, written in Mr. Tucker's handwriting except for signature, admitting petitioner's guilt. Mr. Tucker testified that this was done because Suggs was "adamant about taking the plea, wanted to take the plea, demanded to take the plea," and Mr. Tucker wanted to protect himself.

Although neither Mr. Tucker, nor Mr. Collins, who, it must be noted, saw petitioner only on the occasion of the plea hearing, noted anything unusual about petitioner's behavior, the contrary was true of Justice Nunez. Justice Nunez testified by stipulation that had he been aware of the Messinger report of July 23, 1968, he still might have ordered the Bellevue examination since "[t]he defendant's answers were unusual. The Messinger report was only a preliminary report . . . [It] said that the defendant was without psychosis and did not speak to the issue of whether he was competent to be tried." Indeed, Justice Nunez ordered the Bellevue examination not just in aid of sentencing but "for all purposes, including a determination of whether defendant was competent to be tried." Justice Nunez was the only witness who had an independent recollection of Suggs. He recalled the plea "because of the unexpected answer the defendant gave to his question following the plea."

An examination of the plea minutes reveals that Suggs' responses to post-plea questions posed by Justice Nunez were indeed unusual. Justice Nunez previously had asked Suggs if he was sorry for his acts, and Suggs replied that he was not. After the pleas were taken, Justice Nunez again referred to Suggs' lack of remorse, to which

Suggs gave the most unusual reply that he had tried being sorry once and had lost a finger as a result.

The Court: You are not sorry at all that you did ,
any of these things, Mr. Suggs?

The Defendant: Nothing to be sorry about.

The Court: What?

The Defendant: There is nothing to be sorry about.

The Court: Nothing to be sorry about? Well, what
in your opinion would be something to
be sorry about? If you did what? If
what happened?

The Defendant: If I did something and I did it there
is nothing to be sorry about after I do
it.

The Court: No matter what you do?

The Defendant: No matter what I do.

* * * * *

The Court: Well, don't you think it might help you
if you show that you are sorry, you show
compassion for your victims?

The Defendant: I tried that once.

The Court: What?

The Defendant: I tried that once.

The Court: You tried that once? When was that?

The Defendant: When I was small

The Court: What happened when you were small?

The Defendant: I lost a finger because I tried.

The Court: You lost a finger you say?

The Defendant: Part of it.

The Court: What happened then?

The Defendant: That's when I did something when I had a fight with my sister. I wanted to show my mother I was sorry. Instead of showing her I was sorry, she cut me.

The Court: Who tried to cut you, your mother or your sister?

The Defendant: My mother.

.

The Court: We are going to have the doctors look at you, Mr. Suggs. They may be able to help you in some way because there is something wrong with you, apparently. You seem to be -- whom are you mad at?

The Defendant: No one.

(plea minutes pp. 17-21).

Petitioner is, indeed, missing the top portion of his left pinky finger. Dr. Augustus Kin..., a psychiatrist of impressive qualification, who examined petitioner

in connection with this hearing and who, based on prior psychiatric reports and the record of prior proceedings concerning petitioner, offered expert testimony on petitioner's behalf, testified that in his opinion, Suggs' reference to his mother cutting off his finger was a "confabulation" or "loose association" indicative of psychosis, and the story had no basis in fact. According to Dr. Kinzel, based on his interview with petitioner, the accurate version was that petitioner as a child had caught his finger in the chains of a swing; the chains pinched the finger which had to be amputated as a result. This version of those events is supported by statements contained in a clinical summary of petitioner's stay at Rockland State Hospital from August 1963 to January 1965. In the discussion of petitioner's personal history, the supervising psychiatrist stated: "At the age of 4 the first joint of [petitioner'] little finger was crushed and had to be amputated," and it is noted further:

"Traumatic Factors: At the age of four the patient had an amputation of the first joint of his little finger because of a crushing injury"

Petitioner's stay at Rockland State Hospital was but one period in a life lived basically in reformatory-

type and other institutions since approximately 1961. The psychiatric reports in evidence demonstrate a history of maladjustment and instability, characterized by one suicide attempt while at the Wiltwyck School for Boys sometime after the death of Suggs' mother in the early 1960's, and another while Suggs was incarcerated in the Brooklyn House of Detention in August, 1968. It is of note that Dr. Messinger's first report was prepared prior to this August 1968 incident. Also of note are the records of a prior stay at Bellevue Psychiatric Hospital from July 28, 1965 to August 18, 1965, when petitioner was 14 years old. He was there diagnosed as having a "character disorder [with] paranoid and borderline features," and was referred to as a "passive aggressive type" with a "potential for schizophrenia." Another report of August 14, 1965 indicates that although the interviewer did not consider Suggs a psychotic youngster as yet, "there is a strong possibility . . . that he may develop into a paranoid schizo[phrenic] in the future."

Before proceeding with the psychiatric testimony offered by Drs. Lubin, Kadar and Messinger before Justice Melia, as well as ^{that of} Dr. Kinzel, a crucial report must be detailed. In connection with the preparation of the Lubin-Kadar report of October 21, 1968, several drafts were prepared. The first of these was dictated on September 19,

1968, only six days after the pleas. This draft states that petitioner was able to describe the details of the crimes charged in "an adequate manner," and that he "could be competent with the help of vigorous defense counsel." Dr. Lubin's impression at that time was that Suggs was "Schizoid with Paranoid Features."

Dr. Lubin testified that his conclusion at that time was that petitioner was incompetent, notwithstanding the possibility that if Suggs were a borderline case he might have been aided to a state of cooperation where he then might be considered competent. This tentative conclusion of incompetency was confirmed by the impression contained in Dr. ^{Lubin's} later notes of September 2, 1965 indicating that petitioner suffered from "Schizophrenia, Paranoid Type."

Dr. Lubin, after demonstrating his total familiarity with the standards for determining competence, testified that at no time during his interviews with petitioner was petitioner able to meet the criteria for competency; that petitioner could not fully appreciate the consequences of his position nor cooperate in his defense. He did indicate that competency is a relative matter, and petitioner may have been more or less competent on particular occasions. Dr. Lubin additionally considered the possibility

that petitioner may have wanted to promote the appearance of incompetency in order to escape responsibility, but he concluded that, despite any desire on petitioner's part to feign such a state, petitioner was predisposed to a mental disorder which, under the pressures of the circumstances, caused him to have a "reactive psychosis," i.e., to operate at a psychotic level of judgment. This particular testimony is supported by a clinical summary prepared on December 18, 1968, at Matteawan, which indicates that petitioner stated, among other things, that he "put on an act while at Bellevue in order to be sent to a hospital" in contradiction to a later statement that his lawyer "sent him to a hospital to get rid of him." Despite this initial "admission" of prevarication, petitioner was diagnosed at Matteawan as suffering from a "psychosis with antisocial personality, paranoid and reactive features."

Dr. Kadar testified that it was his opinion that petitioner was incompetent on October 21, 1968, the date that he and Dr. Lubin jointly interviewed Suggs, but that Suggs could have been experiencing a psychotic episode of unknown duration. If so, petitioner could have been competent at the time of Dr. Messinger's July report. Indeed, Dr. Kadar further testified that petitioner's unstable, depressive and paranoid condition diagnosed by Dr. Messinger in July 1968, could have deteriorated into the psychotic

condition, reflected in the October 1968 report. Dr. Lubin's testimony comports with this possibility of petitioner's being competent in July.

Dr. Messinger likewise conceded the possibility of Suggs' experiencing psychotic episodes. Although, as Justice Nunez pointed out, the Messinger report did not, on its face, speak to the issue of competence, Dr. Messinger testified that based on his examination, Suggs was competent on July 23, 1968. However, he further testified that "people who are found competent on one day can become psychotic or incompetent at another time at a later date and they can recover," and that his report was not inconsistent with the Lubin-Kadar report of October 21, 1968 finding Suggs incompetent. Indeed, Dr. Messinger's second report of May 20, 1969 indicates that, subsequent to his first report, petitioner "had a disturbed episode sufficient to have him committed to Matteawan where he remained some five and a half months"

Moreover, the possibility that Suggs could have been experiencing psychotic episodes even during the period in July 1968 that he was undergoing examination at the Supreme Court Psychiatric Clinic was conceded by Dr. Messinger. Since the psychiatric clinic operated on an out-patient basis, unlike Bellevue which provided continuous observation, Dr. Messinger testified that Suggs could have been

short psychotic episodes and "it is not likely that I would know about it" if not manifested in aggressive or other behavior particularly noticeable to the prison authorities.

Dr. Kinzel testified that based on the record, his interview with petitioner, and his expertise, that it was his opinion that petitioner was, in fact, a paranoid schizophrenic and incompetent on September 13, 1968, the day of the pleas. This testimony constitutes the only psychiatric opinion focused directly on the day in question. Dr. Kinzel, like Drs. Messinger, Lubin and Kadar, opined that petitioner had experienced a psychotic episode which he emerged from at Matteawan. It was Dr. Kinzel's impression, however, that the signs interpreted by Dr. Messinger as exhibiting a personality disorder could actually have described a psychosis. This testimony is not inconsistent with Dr. Kadar's view that petitioner's condition as reported by Dr. Messinger deteriorated into a psychotic state.

Dr. Kinzel additionally addressed the substance of the plea minutes which evidenced that petitioner, in response to extensive questioning by the court, described in some detail the circumstances of two of the crimes charged, and, when asked the reason for his acts, petitioner replied as follows:

The Court: This lady that you raped on May 24th didn't have anything to do with the rape of your sister, did she?

The Defendant: No, sir.

The Court: Why did you attack her?

The Defendant: I just had it in mind.

The Court: You just had it in mind?

The Defendant: Yes, sir.

The Court: About how old a person was this lady?

The Defendant: About thirty-six.

. . .

The Court: How old a lady was she, about?

The Defendant: About thirty-nine, forty.

The Court: About thirty-nine or forty. Why did you steal the money from her.

The Defendant: I just wanted to steal it.

The Court: What?

The Defendant: I just wanted to steal it.

(plea minutes, pp. 12-14)

It was Dr. Kinzel's view that petitioner's responses demonstrated a "psychotic lack of judgment;" that is, no serious awareness of the import of the colloquy and necessity for offering a defense. Dr. Kinzel testified that in petitioner's non-psychotic state, he has

"relevant normal consciousness;" when psychotic "he does just what thought comes into his head." This observation is obviously reflected in the plea minutes. Additionally, Dr. Kinzel stated that since persons in psychotic states often can recount their acts quite literally and factually while lacking an understanding of the same, petitioner's detailed report of the crimes was entirely consistent with a psychotic state.

It was petitioner's ability to relate the facts, as well as his adamant desire to plead, that led Mr. Tucker, petitioner's counsel, to believe that petitioner understood the proceedings and could adequately assist in his defense. However, as Dr. Kinzel pointed out, it is not uncommon for a non-psychiatrist, even an experienced defense lawyer, to overlook incompetency, particularly when manifested by what appears to be a capacity to discuss the crimes. Nor, in Dr. Kinzel's view, was petitioner's obstinate resolve to plead inconsistent with a psychosis.

While Mr. Tucker may not have found petitioner's responses indicating a total lack of concern and Suggs' obscure and sudden reference to his losing a finger as a child as a result of his mother's act unusual, it was apparently a strange enough response for Justice Nunez to recall the incident, as well as petitioner himself, some

eight years after the pleas, and to cause Justice Nunez to send petitioner at the time to Bellevue to be examined "for all purposes," even though the court was advised by Suggs at the plea hearing that an examination had already been conducted "right downstairs."

Weighing all the evidence, the conclusion is inescapable that petitioner was incompetent on September 13, 1968. Although Dr. Messinger indicated that petitioner was competent on July 23, 1968, that report was prepared some seven weeks before the pleas were entered, and as reflected in the May 20, 1969 report, Dr. Messinger acknowledged petitioner's psychotic condition which prompted the Matteawan commitment. He also conceded the possibility that petitioner may have been experiencing a psychotic episode even at the time the July examination was being conducted. The only other indicia of competence is Mr. Tucker's testimony and, although an attorney's opinion as to his client's ability to understand the nature of the proceedings and to cooperate in his defense is significant, United States ex rel Roth v. Zelker, 455 F.2d 1105, 1106 (2d Cir.), cert. denied, 408 U.S. 927 (1972), it is by no means controlling, especially in light of Justice Nunez's observation and reaction with which, based on my reading of the plea minutes, I agree. Dr. Kinzel's testimony

relating to the account of petitioner's loss of a portion of his finger, and the indications that the finger was crushed and then amputated, rather than chopped off by Suggs' mother, as recalled by petitioner, bolsters my conclusion in this regard.

Furthermore, the above, coupled with the fact that petitioner was found to be incompetent by Dr. Lubin only six days after the plea, which conclusion was confirmed and corroborated by Dr. Kadar some four weeks later, and that on the basis of the Lubin-Kadar report, without objection by the respondent, petitioner was committed to Matteawan, substantially negates any other conclusion but that petitioner was indeed incompetent at the time of the pleas.

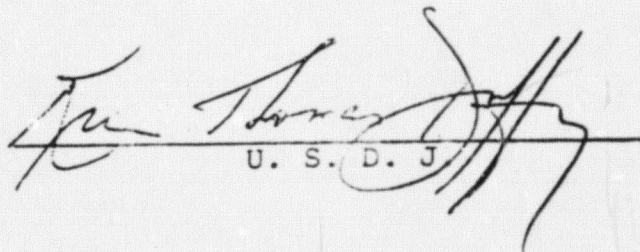
Since the pleas, taken when Suggs was incompetent must be regarded as null and void, McCarthy v. United States, 394 U.S. 459 (1969); Pate v. Robinson, 383 U.S. 375 (1966), petitioner's guilty pleas are vacated and the writ of habeas corpus shall issue sixty days from the date of the filing of this opinion, unless within that time petitioner is allowed to replead to the indictment in state court.

It appears, however, that on the basis of communications I received from petitioner following the hearing, that petitioner may be exhibiting the same symptoms

which gave rise to his original commitment to Matteawan; i.e., a belief of persecution by the prison authorities and fear for his life, and periods of blackouts. It thus may be appropriate that the state court consider causing petitioner to be examined once again as to his mental competency at this time.

I again wish to express the Court's appreciation to Judson A. Parsons, Jr., Esq. and Christopher Kende, Esq. for their assistance in this case.

SO ORDERED.


U. S. D. J.

Dated: New York, New York

April 5, 1977.

FOOTNOTES

- 1/ Because of the remand, the Court of Appeals found it unnecessary to address the ratification and Boykin issues. My inquiry at this juncture is limited to Suggs' competency at the time of the pleas; the remaining issues are fully explored in 390 F.Supp. at 388-89.
- 2/ Petitioner was subsequently disapproved for Youthful Offender Status by Justice Tierney.
- 3/ Nor, apparently was there an inclusion in the record of the May 20, 1969 report of Dr. Messinger, on the basis of which, petitioner was returned to the court for sentencing. This report contained the same diagnosis as the July report.
- 4/ Justice Sandifer, who denied petitioner's second coram nobis petition which raised the issue of competency at the time of the pleas, was likewise unaware of the Messinger reports.

Justice Gold, upon whose order Suggs was committed to Matteawan in November 1968, has testified by stipulation that he has no recollection of petitioner nor of any proceeding concerning petitioner.
- 5/ Mr. Tucker was on the staff of Legal Aid which had fractional representation. He did not represent Suggs at any stage other than at the pleas.

(MINUTES OF COMMITMENT PROCEEDING, NOVEMBER 6, 1968)

JA 132

SUPREME COURT : NEW YORK COUNTY

SPECIAL TERM, PART II

----- x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

JOHN SUGGS, :

Defendant. :

----- x

Bellevue Hospital
New York, N. Y.
November 6, 1968

BEFORE: HON. SAMUEL M. GOLD,

Justice.

APPEARANCES:

For the People : Bruce Henigson, Esq.
Assistant District Attorney

For the Defendant : Anthony F. Marra, Esq.,
Legal Aid Society,
By: David Blackstone, Esq.

- - -

David E. Berkman,
Official Court Reporter

THE COURT: We served the mother. She is the only one that has been served and we find out that she is dead. I think perhaps we should put this over for a week and notify somebody else. Whom would we notify?

(The defendant-patient, John Suggs, enters the courtroom.)

THE COURT: Your mother is not living, is she?

THE DEFENDANT: No.

THE COURT: Do you have any other relatives?

THE DEFENDANT: Yes.

THE COURT: Who, brothers or sisters?

THE DEFENDANT: I got an aunt.

THE COURT: An aunt?

THE DEFENDANT: Yes.

THE COURT: What's her name?

THE DEFENDANT: Geraldine Hall.

THE COURT: Where does she live?

THE DEFENDANT: 519 West 143rd Street.

THE COURT: 519 West 143rd Street. She is your aunt?

THE DEFENDANT: Yes.

THE COURT: When did you see her last?

THE DEFENDANT: That was in June.

THE COURT: Is she your mother's sister?

THE DEFENDANT: I don't know.

THE COURT: But she is your aunt?

THE DEFENDANT: Yes.

THE COURT: Is she the only relative you
can think of?

THE DEFENDANT: Right now, yes.

MR. BLACKSTONE: Hasn't --

THE COURT: We will put this over to November
13th and I will direct -- to November 14th and
I will direct that that the notice be sent to
the aunt.

(Dr. Martin Lubin present.)

MR. BLACKSTONE: I was trying to get my
papers. David Blackstone, office of Anthony F.
Marra.

Is it that his aunt has not been notified?

THE COURT: We had sent a notice to his
mother. We find now that she is dead so that
we are in a situation of not having notified
any relative of his. He told us his relative

is an aunt who lives at that address. We have her name now, so I am directing that we put this over to November 14th.

THE CLERK: The 13th.

THE COURT: Did you say the 13th or 14th?

MRS. ALICE CROSSEN: The 13th.

THE COURT: In the interim, notify the aunt.

(Mr. Blackstone conferred with the defendant-patient.)

MR. BLACKSTONE: Your Honor, I have spoken to Mr. Suggs and he has informed me that he has no wish to have his aunt present at this proceeding. I agree that the Court certainly should notify the aunt of the situation of his waiver which is going to be applied -- the waiver of the hearing, an application for confirmation of the report, but in view of Mr. Suggs' desire -- expressed desire not to have his aunt present here, I will ask that the Court consider not adjourning the case.

THE COURT: All right, then I will withdraw my former direction and we will proceed now to

a disposition of this case. All right.

MR. BLACKSTONE: Your Honor, I have spoken to Mr. Suggs on several occasions and he informs me that he does wish hospitalization. I consequently move to confirm the application for commitment.

MR. HENIGSON: The people also move to confirm the psychiatric report.

THE COURT: All right. It's granted.

- - - -

CERTIFICATION

Certified to be a true and correct record of the minutes in the above-entitled case.

David E. Berkman

David E. Berkman,
Official Court Reporter

Service of 1 COPY copies of the
within Appendix is hereby
admitted this 8th day of
July 1977
Signed _____

Attorney for Petitioner - Appellee

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JUL 8 1977

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